

# THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, }  
Editor.

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{ Hon. JOHN F. DILLON  
Contributing Editor.

**RECORDER HACKETT.**—They are having a lively time in New York city over the office of recorder. It seems that Judge Hackett, who has held the office ably and acceptably for many years, refused to appoint to certain offices within his gift a list of names which had been furnished him by "Honest John Kelly," Chief of the Tammany Society. Judge Hackett wrote a letter to Mr. Kelly declining thus to turn his court into a political workshop, in which he used the following language: "If there exists an office which more than any other one should be utterly divorced from political considerations, it is that of a clerk or deputy clerk of a criminal court. Even if disposed to throw open its books and records to a politician I could not do it, because the deputy clerk is not appointed by the judges of the court of general sessions. The officers who escort and guard prisoners to and from the city prison, and who to some extent control process, ought not to be mere politicians, but such reliable men as the judges select." The upshot is, that Recorder Hackett has been thrown overboard by the Tammany society and Mr. F. A. Smythe nominated in his place. The Republicans and anti-Tammany or Morrissey Democrats have, however, renominated him, and if the "independent voter" does his duty, he will be elected. As the election takes place on the day this side of the JOURNAL goes to press, we are not able to give the result.

**THE BERLIN JURIDICAL SOCIETY.**—They have in the capital of the German Empire a society of this name, whose object is the cultivation of juridical science. Meetings are frequently held throughout the winter, when papers are read and questions discussed relating to the better administration of justice and the prevention of crime. The society provides a reading-room and a library. Prize essays are also in vogue, the prizes being the means of arousing the ambition of the young, and affording an inducement to the older members to engage in studies more profound than remunerative. The latter object is better accomplished by means of a fund, called the "Savigny Stiftung," of which the society is trustee. The Law Magazine and Review, of London, suggests establishing a similar fund in England, where they already have the Eldon and Vinerian scholarships, the Stowell fellowship, prizes established by the former Chichele Professor of International Law at Oxford, and also prizes awarded under the name of Dr. Bernard, to which may be added the Whewell scholarships. The "Stiftung" has already elicited from Prof. Maassen, of Vienna, the History of the Sources and Literature of Canon Law in the West to the close of the Middle Ages, and has assisted Dr. Paul Kruger, Privat-Docent of the University of Munich, in his journeys undertaken for the collection of MSS., as well as in the publication of his new edition of the "Codex Justinianus." A Savigny Committee was established in Barcelona, Spain, in 1869, having as their object like purposes to those of the German society, with whom they kept themselves in correspondence. Unfortunately the condition of affairs in Spain of late years has not been calculated to afford the proper atmosphere for calm and

dispassioned study, but golden hopes are cherished that the new king will restore the equilibrium so much desired. From late accounts of the conduct of that young man, these hopes seem likely to be disappointed.

**BANKRUPTCY PROCEDURE—COMPOSITIONS.**—In the cases of *Spades v. Spades* and *Muir v. Foley*, reported in 8 Chicago Legal News, 33, Mr. District Judge Gresham of the United States District Court for the district of Indiana, sitting at Indianapolis, on application to settle certain questions of practice with regard to compositions in bankruptcy, states the order which will be made in case of an application for a composition, the notice which the register must give, and the entries he must make in his record. The learned judge says that the proposition of the debtor must be *adopted* by a majority in number and three-fourths in value of the creditors *assembled at such meeting*, voting either in person or by proxy; but the resolution must be *confirmed* by the signature of the debtor and of two-thirds in number and one-half in value of *all the creditors*. He also rules as follows: *A reasonable time*, after the adoption of the resolution, may be given, to secure such additional signatures as may be required to confirm it. In settling the composition, whether for or against it, creditors whose debts do not exceed fifty dollars shall not count in determining the *number*, but shall count in determining the *value*. *Secured* creditors are not counted at all, unless they satisfy the register that there is an excess due them over the value of their security. That excess being determined by the register, they are admitted to vote the same as unsecured creditors. Secured creditors, within the meaning of this exception, are those who are secured by a *pledge*, in some form, of property that, apart from their lien upon it, would go into the fund for general distribution. Creditors who have *personal security* only, are entitled to vote the same as unsecured creditors. In case the debtor is a partnership, all creditors, individual and partnership, may vote without a classification, if at the meeting the creditors are content to do so; but if one of any class of creditors perceives that the other class is about to force upon him an unjust composition, he may demand a classification and a separate vote; and should it, at the second meeting, called for the final allowance of the composition by the court, appear to the court that injustice has been done by a common voting of all the creditors, individual and partnership, the court can then consider if any, and what redress should be given.

**SLANDER BY MINISTERS OF THE GOSPEL.**—The clergy wield great power, and, as their statements are respected by many people as though they were made upon divine authority, or at least dictated by the highest human motives, it is obvious that pulpit strictures upon the character or conduct of particular individuals, unless restrained by the temporal authority, might at times work great injury to individuals and stir up great strife in neighborhoods. That it is possible for clergymen so to abuse their sacred functions is evidenced by the case of *Derouin v. Archambault*, recently determined in the Court of Review at Montreal and reported in 19 Lower Canada

Jurist, 157, which was an action brought against a priest for uttering in the pulpit the following language: "There is a man in the parish who has had the audacity to ask the council for a license to sell liquor. I forbid the granting of one to him. He is an idler and a loafer living at your expense, and fattening on your sweat. He keeps a disorderly house which is a scandal to the parish. He must be driven from it. Do not encourage him. Ruin him. Drive him out. That is the way to get rid of him." In the court below judgment was given for the defendant, and one of the grounds on which it was placed was, that the words imputed having been alleged to have been part of a sermon preached in church, the defendant was amenable only to his ecclesiastical superiors. But this pretension was, in the Court of Review, abandoned by the defendant's counsel, and the judges repudiated it in strong terms, and all concurred in reversing the judgment. In New Mexico, a Catholic country, as we have already seen (*ante*, p. 647), they have a statute in the following language, which we commend to our arctic brethren: "Whereas, various ministers of the gospel are frequently committing grave slanders against particular persons, in temples and chapels, losing sight of charity and evangelical meekness, and profaning those sacred places which are dedicated exclusively to the worship of the Supreme Being; therefore, if in the future, any minister of the gospel of any denomination whatever, or any other person, by word or any other manner, slander any person or persons within any temple, they shall on conviction before a justice of the peace or probate judge, be fined not exceeding fifty, nor less than twenty-five dollars."

THE ENGLISH ADMIRALTY has lately issued a circular letter which seems to be opposed to the honorable maintenance of freedom which has so long distinguished the British nation. The commanding officers of war-vessels, cruising in waters of slave-holding countries, are told, regarding their treatment of slaves taking refuge with them, that "slaves must not be misled into the belief that they will find their liberty by getting under the British flag;" nor must they be permanently received on board any species of British ships, except to save their lives; for such action would be "in the first instance, to encourage and assist in a breach of the law of the country, and, next, to protect the person breaking that law." And in foreign ports, where one has been shown to be legally a slave, he must not be retained. Even if a slave, on the high seas, escapes on board a British vessel, he must be surrendered, on demand, to the country whence he escaped. The *Nation* in commenting on this circular, calls attention to Lord Mansfield's decision in the Somerset case, and asserts that this position of the admiralty is contrary to a long course of well-established English decisions. As soon as this circular was made public, meetings were held throughout the kingdom, and remonstrances and petitions poured in from all quarters, condemning the order in no measured terms. The press also lent its power to swell the popular voice, and under the force of so great a pressure, the department recalled this paper. To the British government the *vox populi* is indeed the *vox Dei*; and the present ministry has too slight a hold on its position to dare brook the popular clamor. It has long been a principle in England, that no slave can live on English soil, and the fiction that British ships are a part of the British territory

leads to an application of this principle in the case of vessels. But it is only by the comity of nations or by treaty that Great Britain is permitted to anchor her vessels in foreign harbors; and to interfere with the law of the country in whose ports one of her vessels may be, would not be warrantable. Should a Portuguese come to England with a slave, that slave would be free on touching free soil; but to receive him, a fugitive, on board an English ship, lying in Lisbon harbor, and to declare him thereby a free man, would be to force English municipal law upon a friendly state. The act would be clearly illegal, and its illegality should not be overlooked because of sympathy with the sentiment which prompted it. We therefore think the circular was sound in principle. It only sought to command what the government had long been forced to recognize as an international duty. It was previously the practice to act as the circular required, though not without remonstrance.

OBLIGATIONS OF RAILWAYS TO EXPRESS COMPANIES.—E. M. Sargent brought action against the Boston and Lowell Railroad Company (115 Mass. 416), on the following grounds: For many years prior to 1866 the plaintiff had a contract with defendant, under which he carried on an express business between Boston and Lowell, which by his skill, energy and courtesy he made very profitable. In November, 1865, the defendant gave notice that it would make a contract for carrying express articles with the highest bidder. The contract was awarded to certain parties, claimed to be in fact merely the agents of the railway, and the plaintiff was notified that thereafter he would not be permitted to have his goods carried in the baggage-car of the company, but must have them sent as freight, if at all. The defendant afterwards took upon itself the carrying of all express articles along its line. Though the plaintiff repeatedly offered fair compensation for the privilege of conducting an express business over defendant's road, he was as frequently refused. Hence this action of tort. The plaintiff claimed the right of having special facilities extended to him, because they had been given to other express companies. Wells, J., in delivering the opinion of the court, said: "We know of no principle or rule of law which imposes upon a railroad corporation the obligation to perform service in the transportation of freight, otherwise than as the carrier of goods for the owner in accordance with their consignment; or which forbids it from establishing uniform regulations applicable alike to all persons composing the public to whom the service is due." The court held further, that "railroad companies can not be required to convert their passenger trains to the purposes of freight at the discretion of parties not responsible for the management of the trains; nor can they be compelled to admit others than their own agents and servants upon their trains or to their stations, for the custody, care, receipt and delivery of freight or parcels." The fact that the company had given plaintiff special facilities under a special contract, was considered no good reason for forcing defendant to continue the extra accommodations after the contract was at an end. The statute of 1867, c. 339, requires railways to give to all persons or companies reasonable and equal terms and accommodations; but it was said that this did not forbid a company from carrying on the express business itself, and to refuse to allow similar

privileges to other companies; since the manner in which the railway shall fulfill its duty to the public is within the discretion of the directors. It is not material that the corporation carries on this business itself, or that this is *ultra vires*. The obligation of railways is to accommodate the public; and this being accomplished, the public and the law are satisfied. Special facilities are rightly the subject of special contracts alone.

### Unanimity of the Jury.

There seems to be at the present time an almost universal public opinion prevailing that the requirement of unanimity in a verdict has become a serious defect in the administration of justice. The control exercised by the judiciary in England over juries, the care with which juries are there selected from the more responsible and intelligent classes, have in some measure prevented, in that country, the injurious consequences of the unanimity principle, which we but too often have witnessed with us. We are sure that had they in England the same experience on the subject that we have, it would have been abolished there long ago.

Many years ago the writer of this had prepared a bill, which was referred to the Committee on the Judiciary of the Legislature of Illinois, and received the approbation of that committee, though it failed to pass, in which he attempted to regulate the finding of a verdict in such a manner as to divest the unanimity feature of its dangers, without doing absolutely away with it. The idea was not an original one, for it was found in a law which was, and probably still is, in force in the Australian colonies of Great Britain; and was represented, in a very able article on the jury system in one of the English quarterlies, as working remarkably well.

The bill before the Illinois legislature provided, that the court should minute the exact time when the jury retires to consider of their verdict, that a verdict rendered within a certain time, say six hours, must be unanimous (so as to prevent hasty decisions by less than twelve men); that after that time, and within six hours following, a verdict of eleven should be received; within the next six hours, one of ten; within the next six hours, one of nine; and after that, one of eight. This was the principle of the law proposed. Perhaps it might have still been improved by allowing a bare majority to find a verdict, provided the judge trying the case approved of it, which is a method adopted in some of the states on the continent.

While on this point it may also be suggested whether the jury trial should not be dispensed with in many cases. It should perhaps be maintained in all criminal cases, and all actions sounding merely in damages, as they are technically called, or in all cases where both parties consent to it. It is well known that most lawyers are agreed that in cases of contracts, land titles, accounts, etc., no more unsatisfactory mode of trial could have been devised by the ingenuity of man than that by jury. We try the most important chancery cases now by the courts exclusively; and, under the supervision of higher courts, this mode of deciding cases has proved to be acceptable.

The constitutions of many of our states may have to be changed to allow this latter improvement in our jurisprudence; but it is pretty certain that an amendment doing away with a

jury, or allowing the legislature to do so in such cases as mentioned, would be readily adopted by the people.

G. KOERNER.

BELLEVILLE, Oct. 26, 1875.

### The Hon. James R. Lackland.

On the 9th ult. died the Honorable James R. Lackland, one of the foremost members of the Missouri Bar. At a meeting of the St. Louis Bar, held on the 16th inst., a beautiful memorial of his worth was formally expressed and adopted by his professional brethren. An interesting incident varied the usual exercises of such occasions. A wreath of *immortelles*, produced at the meeting, was ordered to be hung in the room in which he had presided as Judge of the St. Louis Circuit Court. It will now be seen hanging there, a touching memento of his fame and virtue. The expression of affection and esteem in which his memory is held by his associates was earnest, sincere, and universal.

In these spontaneous tributes of honor to the memory of the deceased, the St. Louis Bar has unquestionably honored itself. It would have been a reflection on its own title to the high position of integrity and usefulness to which it aspires, if it had passed the death of such a distinguished and beloved chieftain in silence and indifference. The brilliant and eventful career of the deceased, as well as its sorrowful termination, ought to be a subject of the profoundest interest to the profession in all its departments. The older our country and institutions become, the farther we seem to leave in the past the type of character which distinguished the life of this eminent jurist and advocate.

James R. Lackland was born in Maryland in 1820. His father emigrated to Missouri in 1828, and settled on the homestead in St. Louis county, from which the lifeless remains of his honored son were carried to Bellefontaine Cemetery on the 11th ult.

Like all the immediate descendants of the pioneers of the West, he was educated to a manhood of usefulness by the toils and privations which attended his youth. In the labor of the farm, in which he engaged to assist his father in the support of the family, he first learned and appreciated the reality and earnestness of life.

His means of education were necessarily limited by the circumstances of his situation. Nevertheless, he acquired by his own enterprise, and the assistance his father was able to afford him, a fair English education. It seems that he started out in life, when he left the homestead, without any thought of the legal profession, engaging first as clerk in a wholesale grocery business, next as an assistant clerk on a steamboat on the river. Mere chance or accident gave him employment in the clerk's office of the St. Louis Court of Common Pleas. It was while engaged in this employment that his attention was first turned to the legal profession. He immediately commenced the study of the law while still discharging his duties as deputy clerk. Entering the office of Hon. Charles D. Drake soon thereafter, he was admitted to practice in 1846.

At the threshold of his career, he met the usual discouragements allied with the "toil and endeavor" of the young practitioner, which were not in any way mitigated by the presence of either fortune or influential friends.

But no one was better qualified to surmount such adversi-

ties. Diligent, self-reliant, hopeful, he toiled on in the prosecution of his profession. His enterprise met with the success it deserved in the honors and pre-eminence which followed.

He was first elected to the position of circuit attorney. He next became judge of the criminal court. After his term of office expired on the criminal bench, he was elected to the circuit bench, which position he held till 1859, when he voluntarily resigned it, engaging again in active practice.

In all these positions requiring a varied range of talent, he exceeded the expectations of his fellow citizens in the discharge of the duties assumed by him. As a representative of the state, prosecuting offenders for violation of its laws; as a judge of both criminal and civil courts, holding the scales of justice; he was equally distinguished for his ability, sincerity and loftiness of purpose. It is related of him that on one occasion while engaged as circuit attorney in the prosecution of an offender, he was approached at his office by a private citizen exceedingly anxious for a conviction, who, after commending his zeal in the prosecution, laid down an additional emolument as a reward for his services. The generous citizen was informed that nothing of the kind could be received, but he withdrew, paying no attention to the statement. He had scarcely reached the middle of the stairway leading down to the street, when the gold and silver he had left behind fell on him in a shower from the hands of the indignant representative of the state, and he suddenly entered into a lively competition with some newsboys in gathering up his scattered gift.

Upon his return to practice he met with marked success. It is not often we see united in the same person the qualities of both advocate and judge. But in his career it would be difficult to say in which he most excelled.

Certainly the fame of an advocate and *visi prius* judge is transitory. Of all the decisions rendered by him on the bench, of all his effective and wonderful efforts before juries, scarcely a fragment remains, except in the memory of those who were fortunate enough to hear him. In the case of *Castello v. St. Louis Circuit Court*, 28 Mo., 259, will be found a decision rendered by him, while on the circuit bench, being accidentally preserved in a return made by him to a writ of mandamus from the supreme court. Meagre as this fragment is, it is sufficient to disclose the method of ratiocination employed by him in his investigations. As an advocate he made no pretensions to literary or classical excellence, and yet, there were few if any of his cotemporaries, who could address our common jury with the persuasion and convincing power which he invariably wielded.

His mind was quick and penetrating in its perceptions. It was both analytical and sympathetic in its processes. He was equally successful in demolishing the objective points of his adversary, and in building up a structure of his own, which invited the admiration and assent of the jury. To these rare qualities he added the habits of patient and industrious research called into requisition long before the day of trial. In the trial itself, his captivating courage, indomitable will and fiery energy seldom failed to carry to a victorious conclusion the earnest and sincere purpose with which he always seemed to be possessed in the conduct of his cases. His cross-examinations were always bold and skillful. In an argument of fact to a jury, it is generally conceded that he had

no equal at the St. Louis bar. His love of truth, his profound knowledge of human nature, his extraordinary grasp of the philosophical relation of facts to each other, furnished him the resources of an effective and impassioned logic, which rose above the cunning art of appealing to the prejudices which slumber in the jury box.

If at the time he retired from the bench in 1859, he had devoted a couple of years to the restoration of his system, which at that time had been weakened, but not seriously impaired, by excessive application to his professional duties, he might have prolonged for many years his life of immeasurable usefulness. But without any rest he engaged in the arduous struggles of active practice. It seems that in 1864 his failing system fell a prey to the wasting inroads of a pulmonary disease. From that time on till the end of life he walked in the shadow of death.

The point of our feeble notice would be missed if we failed to observe that in the triumph of his life he demonstrated, in a signal manner, the superiority which integrity, honesty and truthfulness possess as successful forces in the conduct of human affairs, over the fraud, deceit and dishonesty which short-sighted men sometimes invoke to advance their worldly ambition.

#### Shipment with Reservation of Jus Disponendi—Transfer of Draft with Bill of Lading—Evidence—Practice.

THOMAS EMERY'S SONS v. IRVING NATIONAL BANK.\*

*Supreme Court of Ohio, December Term, 1874.*

Hon. GEORGE W. McILVAINE, Chief Justice.

" GEORGE RIX.	} Associate Justices.
" JOHN WELCH,	
" WILLIAM WHITE,	
" W. J. GILMORE,	

1. *Transfer by Delivery of Bill of Lading.*—By the rules of commercial law, a bill of lading is regarded as the symbol of the property therein described; and in case the shipper reserves to himself the *jus disponendi*, he can transfer the title, at any time before the property is delivered by the carrier to the consignee, as effectually by the delivery of the bill of lading as by the delivery of the property itself.

2. *Reservation of Jus Disponendi.*—If the consignment be made by a vendor to a vendee, the question whether the consignor reserved the *jus disponendi* is one of intention, to be gathered from all the facts and circumstances of the transaction.

3. *Whether Carrier Agent of Shipper or Consignee.*—If the right to control the property be reserved to the shipper, the carrier must be regarded as his agent; if not, than as the agent of the consignee.

4. *Terms of Bill of Lading, how far Conclusive.*—On such question of intention, the terms of the bill of lading are to be taken as admissions of the consignor, and are entitled to great weight, but are not conclusive.

5. *Contract by Consignee for Special Rate of Freight.*—Nor is the fact that the consignee had contracted with the carrier for special rates of freight, conclusive that the goods were delivered by the consignor to such carrier as the agent of the consignee.

6. *When Consignee can not hold Goods against Transferee of Bill of Lading.*—Where the vendor of goods consigns them to the purchaser, taking a bill of lading from the carrier, and intending to reserve the right of control over them, at the same time draws upon the purchaser for the price, and delivers the bill of exchange, with the bill of lading attached, to an indorsee, for a valuable consideration, the consignee, upon receipt of the goods, takes them subject to the right of the holder of the bill of lading to demand payment of the bill of exchange, and can not retain the price of the goods on account of a debt due to him from the consignor.

7. *Appellate Procedure—When Error, in Remanding Cause, to direct Judgment for Plaintiff.*—Where a judgment is reversed for error in overruling a motion for a new trial, on the ground that the judgment was contrary to the evidence, it is error for the reviewing court to remand the case, with instruction to render judgment in favor of the plaintiff in error, he not being entitled to judgment on the pleadings, and there being no

\* From advance sheets of 25 Ohio State Reports, received through the courtesy of the publishers, Messrs. Robert Clark & Co., of Cincinnati.

agreed statement or finding of facts, and the case being one in which either party had a right to a jury trial.

Error to the Superior Court of Cincinnati.

Thomas Emery's Sons, plaintiffs in error, a firm doing business in Cincinnati, Ohio, had, before the dates hereinafter named, transacted business with one Mirrieles, a produce broker in the city of New York, which resulted in leaving a balance due from Mirrieles to the plaintiffs in error. This was the nature of the transaction: Upon the order of Emery's Sons, Mirrieles purchased goods in New York, on his own account, and shipped the goods to them at Cincinnati, by a common carrier, with which Emery's Sons had special arrangements for freight, upon an agreement that Emery's Sons would pay him the cost of the goods at New York and one per cent. commission added. It was usual for Mirrieles, upon making shipment of goods, to take from the carrier a bill of lading, and to draw upon them for the price of the goods and his commission, and at the same time to obtain a discount of the drafts with bills of lading attached, from the Irving National Bank at New York. These drafts had uniformly been honored by the drawees upon presentation by the bank.

On the 24th of March, 1869, Mirrieles shipped three casks of stearine to Emery's Sons, by the Atlantic Time Line, and took from the carrier a receipt or bill of lading, the material part of which reads as follows: "New York, 24th March, 1869. Received from G. M. Mirrieles the following packages (contents and value unknown), in apparent good order, and marked as in margin. (3) Three casks stearine. For Thomas Emery's Sons." In the margin was written "Cin., O." Thereupon, Mirrieles drew his bill of exchange as follows:

"\$299 21-100.

NEW YORK, March 24, 1869.

"On demand, pay to the order of myself, two hundred and ninety-nine 21-100 dollars, value received, and charge the same to account of 3 casks stearine.

"To Messrs, Thos. Emery's Sons, Cincinnati.

"G. M. MIRRIELES."

And having indorsed the same, on the same day, delivered it, with the bill of lading, to the defendant in error, who paid therefor full value. At the same time Mirrieles sent to Emery's Sons a letter, as follows:

"NEW YORK, March 24, 1869.

"Messrs. Thomas Emery's Sons, Cincinnati:

"GENTLEMEN:—Herewith please find invoices of 3 casks stearine, amounting to \$299.21, for which I have valued this day. Yours truly,

G. M. MIRRIELES."

On the 26th of the same month Mirrieles shipped as per the following bill of lading:

No liability assumed for miscarriage or wrong delivery of goods that are marked with initials, numbers, or that are imperfectly marked.

Weights and classifications subject to correction.



Cincinnati, O.

Thos. Emery's Sons.

On account of which he drew as follows:

"\$1,098 42-100.

NEW YORK March 26, 1869.

"On demand, pay to the order of myself, ten hundred and ninety-eight 42 100 dollars, value received, and charge the same to account of 10 casks stearine.

"To Messrs. Thos. Emery's Sons, Cincinnati, Ohio.

"G. M. MIRRIELES."

New York, 26th March, 1869.

Received from G. M. MIRRIELES

The following PACKAGES (contents and value unknown), in apparent good order, and marked as in the margin.

(6) Six Hhds. Stearine.

(4) Four Hhds. Stearine.

And having also sold and delivered this draft, with bill of lading attached, to the defendant in error, he wrote to Emery's Sons:

NEW YORK, March 26, 1869.

"Messrs. Thomas Emery's Sons, Cincinnati:

"GENTLEMEN:—Herewith please find invoice of 10 hhds. stearine, amounting to \$1,098.42, for which I have valued on you today. Yours truly,

"G. M. MIRRIELES."

Irving National Bank forwarded these respective drafts, with bills of lading attached, for collection, on the 26th and 27th of same month; but upon presentation to the plaintiffs in error, payment was refused.

After these bills of lading had been thus transferred to Irving National Bank, Emery's Sons received and sold both shipments of stearine, and refused to account to the bank for the proceeds or price.

The original action was brought in the Superior Court of Cincinnati, by the bank, to recover the amount of the proceeds of sales. The defendants, by way of defence, insisted that they might rightfully retain the money, and apply it on the indebtedness of Mirrieles to them.

On the trial, at special term, the court rendered judgment in favor of the defendants. The plaintiff moved for a new trial, which motion was overruled, and a bill of exceptions, embodying all the testimony, was taken. On error the court at general term reversed the judgment rendered at special term, and remanded the case to special term with instructions to the court to proceed to render a judgment in favor of the plaintiff. Thereupon, the court at special term, without granting a new trial, proceeded to render judgment in favor of the plaintiff.

This proceeding is prosecuted to reverse the judgment of reversal rendered by the court at general term, and the judgment subsequently rendered at special term, in favor of the plaintiff below.

King, Thompson & Avery, for plaintiffs in error.

The only question before the court in general term, was whether the court in special term erred in refusing a new trial. In reversing a judgment of the court in special term, the court in general term, by the act organizing the court, "may proceed to render such judgment as the court below should have rendered." The judgment the court below should have rendered, could be nothing but the granting the new trial. It was upon petition in error only that jurisdiction of the general term attached. The error in that petition, was the overruling of plaintiff's motion for a new trial. A petition in error does not bring the whole cause before the appellate court. 12 Ohio St. 341.

Is it too bold an assertion, that only when finality of fact has been reached through "agreed statement," or "special finding," may an appellate court, coming to finality of law, proceed to render "such judgment as the court below should have rendered?" 18 Ohio St. 311; 16 Ohio St. 348; 5 Ohio St. 251; 18 Ohio St. 234.

When Mirrieles mailed the invoices to defendants, and delivered the shipments to their carriers, *prima facie* the property vested in them. Chitty on Carriers, 97, 124; Powell, 207; Angell, sec. 497; Benjamin on Sales, 130, 514, 658; Hilliard, sec. 42, chap. 7; sec. 17, chap. 17; 8 Term. 330; 3 B. and P. 582-584; 5 Ohio, 100, 101; 1 Gray, 542; 1 Johns. 214; 14 Wend. 546; 22 N. Y. 368.

The bills of lading were not transferable by "delivery as symbols of property," because by consignment, invoice, and transfer to the carrier, the property had been transferred. "Symbolical delivery" may be made only where property in the goods has been retained.

"Negotiation" by delivery may be effected only where a bill is to bearer. Allen v. Williams, 12 Pick. 297; Bank of Chicago v. Wright, 46 Barb. 45; Nathan v. Giles, 5 Taunt. 558.

"As evidence of intention, as proof of authority, as a symbolical delivery of the property, which it represents, the bill of lading has a controlling influence." 1 Smith Lead. Cas. pt. 2 marg. 899.

But it should be drawn to the order of the shipper, if not intended to vest in the consignee. Angell on Carriers, sec. 511.

On this subject see *Wait v. Baker*, 2 Exch. 1-6; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Turner v. Trustees of Liverpool Docks*, 6 E. L. & E. 507.

*Joshua H. Bates*, and *Clement Bates*, for defendant in error:

The validity of the transfer of a bill of lading without writing is now settled beyond any dispute in England, as well as in this country. *Second National Bank of Toledo v. Walbridge*, 19 Ohio, St. 419; *Allen v. Williams*, 12 Pick. 297; *Marine Bank of Chicago v. Wright*, 46 Barb. 45; *Bank of Rochester v. Jones*, 4 Comst. 497.

When the *jus disponendi* has evidently been reserved by the seller, a delivery to a carrier, who was designated by the buyer, does not change the rights of the parties. *Benj. on Sales*, Chap. on *jus disponendi*; *Mitchell v. Ede*, 11 Adol. & El. 888; *Turner v. Trustees of Liverpool Docks*, 6 E. L. & E. 507; 6 Exch. 543.

McILVAINE, C. J.—Where goods are delivered by a vendor to a common carrier, consigned to the vendee, the question, whether the title thereby passes from the vendor to the vendee, depends upon the intention of the vendor, which intention is to be gathered from all the circumstances of the transaction.

If the goods be shipped in pursuance of the purchaser's order and at his risk, or if it otherwise appear to be the intention of the shipper to part with the title, the carrier becomes the agent of the consignee, and the delivery to him is equivalent to a delivery to the purchaser. If the vendor, however, in making the consignment and delivering the goods to the carrier, does not intend to part with his title to, and control over them, the carrier must be regarded as the agent of the consignor and not of the consignee.

In all such transactions, the bill of lading is an important item of proof as to the intention, but it is not necessarily conclusive of the question. If the bill of lading shows that the consignment was made for the benefit of the consignor or his order, it is very strong proof of his intention to reserve the *jus disponendi*. And on the other hand, if the bill of lading shows that the shipment is made for the benefit of the consignee, it is almost decisive of the consignor's intention to part with the ownership of the property. If the bill of lading does not disclose the person for whose benefit the consignment is made, it is of less weight on the question of the shipper's intention. We have no doubt, however, that if the bill of lading shows a consignment by vendor to vendee, and no other circumstance appears as to the intention, it will be taken as *prima facie* evidence of an unconditional delivery to the vendee.

As between the consignor and consignee, the bill of lading can not be regarded as a contract in writing, but merely as an admission or declaration on the part of the consignor as to his purpose, at the time, in making the shipment, and such admission is subject to be rebutted by other circumstances connected with the transaction.

By the rules of commercial law, bills of lading are regarded as symbols of the property therein described, and the delivery of such bill by one having an interest in or a right to control the property, is equivalent to a delivery of the property itself. A consignor who has reserved the *jus disponendi*, may effectuate a sale or pledge of the property consigned, by delivery of the bill of sale to the purchaser or pledgee, as completely as if the property were, in fact, delivered. If such transfer of the bill of lading be made after the property has passed into the actual possession of the consignee, the transferee of the bill takes it subject to any right or lien which the consignee may have acquired by reason of his possession. But if the bill of lading be transferred by way of sale or pledge to a third person, before the property comes into the possession of the consignee, the consignee takes the property subject to any right which the transferee of the bill may have acquired by the symbolic delivery of the property to him.

The principle on which the title to goods may be transferred by a transfer of the bill of lading, is wholly distinct from that on which the right of stoppage in transitu rests. The right to stop goods in transit, exists only where the vendor has consigned them to the buyer under circumstances which vest the title in the buyer. The transfer of goods by delivering the bill of lading, can be made only in cases where the vendor has not parted with the title.

In the case before us, it must be assumed that the court below, at general term, found from the evidence, that Mirrieles did not intend, by delivering the stearine to the carrier, to vest the title in Emery's Sons absolutely as purchasers, but only on condition that they would accept and pay the bills of exchange drawn on account thereof. It is true that this intention was not expressed on the face of the bills of lading, but it fully appears from other facts and circumstances. The letter of Mirrieles, of the date of each shipment, containing the invoice of the goods, and informing the consignees that the invoice had been valued (drawn against) that day; the drawing of the bills of exchange on account of the invoices and for their full value; the endorsement of the bills of exchange with bills of lading attached, and their delivery to Irving National Bank on discount, all on the day of shipment, clearly show the intention of Mirrieles at the time of shipment, to reserve the *jus disponendi*. And this conclusion is much strengthened by the further fact that previous transactions between the same parties had been conducted in the same way, without objection.

Upon this theory of the case, we are of opinion that Irving National Bank by discounting the bills of exchange with the bills of lading attached, became vested of the property consigned to Emery's Sons, as a security for the payment of the drafts, as fully and completely as if the stearine itself had been delivered into its actual possession, and was entitled to demand from the consignees an account of the proceeds of sales, the price of the goods.

It is claimed, however, that these bills of lading were not transferable by delivery merely, for the reason that they were not made so negotiable by their terms. Bills of lading are not, and can not be made, by any form of words, negotiable in the sense that commercial paper payable to bearer, or order, or assigns is negotiable. If such words of negotiability be contained in them, they only indicate the intention of the shipper as to the person for whose use the consignment is made. If the goods be deliverable, by the terms of the bill, to the consignee or his order, there can be no doubt that the person to whom the bill may be transferred by the consignor, would be charged with notice of the rights of the consignee, and on the other hand, if the bill be made to the use of the consignor or his order or his assigns, the consignee would be charged with notice of the rights of those to whom the bill may have been transferred. But in either case, the question is open to enquiry as to what such rights may be, and can be determined only by enquiry into the real nature and character of the transaction.

A bill of lading being symbolical of the property described in it, like the property it represents, may be transferred by delivery merely, and this is so, without regard to the presence or absence of words of negotiability on its face. It is unlike commercial paper, however, in this—the assignee can not acquire a better title to the property thus symbolically delivered, than his assignor had at the time of assignment.

It is also claimed that these bills of lading were not transferred to the bank until after the consignees had obtained possession of the goods, and a right had thereby accrued to them to hold the goods, or the price thereof, for the satisfaction of the claims due them from their consignor. This claim is based on the theory that the possession of the carrier was the possession of the consignees, and has already been answered. We do not understand it to be claimed that the goods were, in fact, delivered to the con-

signees by the carrier, before the transfer to the bank of the bills of lading. But if it were so claimed, we could not disturb the finding of the court below on that question. From the weight of the testimony, we think the bills of lading had been transferred to the bank before the goods arrived at the place of their destination.

On petition in error by the plaintiff below, the superior court, sitting in general term, reversed the judgment rendered at special term in favor of the defendants, and remanded the cause to special term with instructions to the judge there sitting to render judgment for the plaintiff, which was done according. In this we think there was error. The only question before the general term was as to the alleged error of the court at special term in overruling the motion of the plaintiff for a new trial. When that error was found by the reviewing court the judgment below was properly reversed, and the only judgment which should have been rendered after reversal, was to grant a new trial as moved for at special term. The plaintiff not being entitled to judgment on the pleading, and there being no agreed statement of facts, or a special finding of facts by the court to which the case had been submitted on the evidence, it was not a case for final judgment. The order made at the general term, that the judgment be rendered at special term, will therefore be reversed. The judgment afterward entered in favor of the plaintiff is also reversed, and the cause remanded to the court below with instructions to grant the plaintiff below his motion for a new trial, and that it proceed to final judgment in the cause according to law. JUDGMENT REVERSED.

WELCH, WHITE, REX and GILMORE, JJ., concurred.

### Federal Court Procedure—Plea of Prior Action in State Court.

BROOKS v. MILLS COUNTY.

*United States Circuit Court, District of Iowa, October Term, 1875.*

Before Hon. JOHN M. LOVE, District Judge.

It seems that a plea to an action in the Circuit Court of the United States, which sets up the pendency of a prior litigation in a state court within the same district, between the same parties and upon the same subject-matter, is a good plea in abatement; but if the plea on its face discloses that the parties to the litigation in the state court are not the same as those to the action in which the plea is filed, the defendant will be ruled to answer.

In Equity.

*Hall & Stone*, for plaintiffs; *D. H. Salomon* and *L. W. Ross*, for defendants.

LOVE, J.—This cause is before the court upon a plea in abatement. The plea sets up the pendency of a prior suit upon the same subject matter, and between the same parties, in the District Court of Mills county, Iowa. If the plea really presented the question which the pleader intended to raise, it would be one of no little difficulty. That question is whether or not a party may, in the United States Circuit Court for any district, plead in abatement of a suit therein the pendency of a prior suit in a state court, within the same district, between the same parties, upon the same subject matter. This precise question has never been decided by the Supreme Court of the United States. It seems however to be supposed by counsel that it has been repeatedly decided by the Circuit Courts of the Union. We shall presently see how much of truth there is in this assumption. Let us first, however, consider the question in the light of reason and sound policy.

If the Circuit Court of the United States and a state court in the same Federal district may proceed at the same time to adjudicate the same matter between the same parties, what results must inevitably follow? First, the suitor would be harassed by the same litigation in two several tribunals of competent jurisdiction. Congress has seen fit so to frame the law as to leave the state courts in possession of concurrent jurisdiction with the United States Circuit

Court in civil actions and suits between citizens of different states. Why, then, should the suitor be harassed with two suits at the same time for the same matter, before two courts of competent and concurrent jurisdiction?

Two courts so proceeding and exercising judicial power within the same territorial limits would move upon parallel lines, with no authority to review each others' judgments, and no common superior to bring them into harmony.

Thus the Federal Court might decide a controversy for the plaintiff and the state court for the defendant, so that the parties would have a conflicting adjudication of their rights. The judgment of the one court might be a lien upon the defendant's property, and the judgment of the other a lien upon the plaintiff's property. The one might proceed to levy execution upon the plaintiff's goods, and the other upon the defendant's goods. All this would lead to "confusion worse confounded." It would tend to bring the two jurisdictions into unseemly and dangerous conflict.

But it is said that this evil of conflicting adjudications could be prevented by very simple means. The party first obtaining judgment could go into the other jurisdiction and plead his judgment *puis darrein* in bar of the action there pending. It is evident, however, that this remedy might prove utterly impracticable and ineffectual, since the two courts might render diverse judgments on the same day, or at all events at times so near as to render it impossible for the successful suitors in the one court to set up his judgment in bar in the other. Again, the unsuccessful suitor in the one court might very easily suspend the judgment against himself by appeal or otherwise, so as to prevent his successful adversary from pleading his judgment in bar in the other jurisdiction in time to make the plea effectual. It would therefore seem most rational and just that a plea in abatement should be allowed in order to avert consequences so mischievous.

It must, however, be conceded that the current of authority, so far as there is any authority on this question, runs in opposition to the plea in question. The dicta of the United States circuit-judges seem to proceed upon the assumption that the two jurisdictions are foreign to each other in the same sense that the courts of independent countries and of the different states of the Union are foreign to each other. Of course the pendency of a suit in a foreign country, or even in a state or district different from that of the court in which the plea is urged, would be no matter of abatement. Where two jurisdictions exist and exercise judicial power over wholly different territories, there can be no such mischiefs to be apprehended as I have pointed out flowing from conflicting adjudications, and diverse liens, and processes of execution. Therefore on very serious mischiefs could arise from opposite and conflicting judgments upon the same subject-matter, and between the same parties, in two or more different states of the Union. But the case would be otherwise, if two such hostile judgments should be rendered by competent courts exercising judicial power within the same territorial limits. Yet some of the United States Circuit Courts seem wholly to ignore this manifest distinction, and to reason upon the subject as if the state courts and the United States Circuit Court in the same states exercised jurisdictions entirely foreign to each other. I have examined numerous state authorities, and I find that they go no farther than to establish the proposition that an action pending in a foreign court, or in a court of another state of the Union, or in a court of the United States in another state or district, can not be pleaded in abatement. See *Brown v. Joy*, 9 Johnson, 221; *Newell v. Newton*, 10 Peck, 470; *Walsh v. Durken*, 12 John. 99; *McTilton v. Love*, 13 Ill. 486; *Mitchell v. Bunch*, 2 Paige, 606; *Salmon v. Walters*, 9 Dana, 422.

In all the reported cases in the federal circuit courts, except *Loring v. Marsh*, 2 Clifford, 322, the prior suits were pending either in courts of foreign countries or in the courts of other states, or in some United States Circuit Court for a district other than that of the court in which the matter in abatement was pleaded. See

White v. Whitman, 1 Curtis, 494; Lyman v. Brown, 2 Curtis, 559; Wadleigh v. Vesey, 3 Sum. 165.

Loring v. Marsh is not strictly in point, since it came before the court, not by plea in abatement, but by motion to continue the cause in the United States Circuit Court of Massachusetts, upon the ground that the same cause was pending in the Supreme Judicial Court of Massachusetts. Mr. Justice Clifford, however, seems to have considered the motion analogous to a plea in abatement, and he discussed it in that view. Thus, he says, "Cases may unquestionably be found deciding that the mere pendency of another suit for the same matter, between the same parties, in another jurisdiction, may be pleaded in abatement or in bar of another suit." But he adds that "the undeviating rule in this circuit has been that the pendency of another action for the same cause in a state court is not a good plea in abatement." "Suppose, however," he adds, "it were otherwise, the rule would not apply to this case, because the nature of the proceedings is different, the parties are not the same, and there are questions presented for decision here which are not involved in the suit in the state court." It will not escape notice that Mr. Justice Clifford admits that, even supposing the plea to be valid, the rule would not apply to the case he was deciding, because "the nature of the proceedings is different, the parties are not the same, and there are questions presented for decision here which are not involved in the state court." In view of this statement the opinion expressed by the learned and venerable judge, that the pendency of a suit in the state court could not be pleaded in abatement or bar in the federal court in that state, appears to be something in the nature of an *obiter dictum*. I have examined carefully all the cases cited by him from the reports of state and federal decisions, and I do not hesitate to affirm that not one of them is in point to sustain his dictum, when applied to such cases as Loring v. Marsh, and the case now before us. In the case cited, the suits pleaded in abatement were pending invariably, either in foreign countries, or in other states, or in United States judicial districts other than the one in which the plea was presented. Whoever may wish to verify this statement, can readily do so by reference to the cases cited by Judge Clifford, and also by a reference to those cited in this opinion. I have not been able to find all the English cases, but I apprehend that such of them as appear to be opposed to the validity of the plea, relate to the pendency of prior actions in the courts of foreign countries, or of the British colonies, or Scotland, or Ireland; all of which are foreign to the English judicature. I apprehend that an English case can not be found in which it has been held that the pendency of a suit in one of the courts of Westminster was not a good plea in abatement to a subsequent suit in another of the courts of Westminster of concurrent jurisdiction. See Maul v. Maury, 7 Term. Rep. 470; Imlay v. Ellisen, 2 East. 453; Dillon v. Alvares, 4 Ves. Jun. 358; Foster v. Vassal, 3 Atk. 557; Bayley v. Edmunds, 3 Swanst. 703; Howell v. Waldren, 2 Ch. Ca. 35; 2 Dan'l Prac. 721; Story's Eq. Pleading, 41.

The case now before us presents no real difficulty, since it appears upon the face of the plea that the parties to the suit in the state court are not the same as the parties to this bill. The plea must therefore be overruled and the respondents ruled to answer.

ORDERED ACCORDINGLY.

#### Rights of Holders of Land in Kansas under Void Tax Deeds.

SMITH ET AL. v. SMITH ET AL.

Supreme Court of Kansas, October, 1875.

Hon. S. A. KINGMAN, Chief Justice.

" D. M. VALENTINE, } Associate Justices.  
" D. J. BREWER, }

Official Syllabus.—By the Court—Valentine, J.—Where a person is in the possession of certain real estate, holding the same under a tax deed executed in 1864, upon a tax sale certificate issued in 1862 to a county, and assigned in 1864 to the holder of a

tax deed by the county treasurer, who had no authority at that time to assign the same; and where such person has, while holding said real estate under said tax deed, made lasting and valuable improvements on said real estate: Held, that although said tax deed is void upon its face, yet, that the holder thereof, when an action is brought against him by the original owner of such real estate for the recovery of the same, is entitled to the benefit of both the "Occupying Claimant's Act" (Gen. Stat. 749 et seq.) and section 117 of the tax law (Gen. Stat. 1057). All the justices concurring.

#### Appeal from Atchison County.

W. W. Guthrie, for the plaintiffs; Horton & Waggener, for the defendants.

VALENTINE, J., delivered the opinion of the court.

This was an action for the recovery of certain real property, to-wit: Lot 2 in block 2 in the city of Atchison, Kansas. In this opinion we shall speak of the plaintiff and those under whom they claim as the plaintiff, and the defendants and those under whom they claim as the defendant, and shall not mention particularly each separate person. The plaintiff was the original owner of the lot in controversy. The defendant holds the same under a tax deed. The court below held that the defendant was entitled to the "Occupying Claimant's Act" (Gen. Stat. 749, Sec. 601, et seq.) and also of section 117 of the tax law (Gen. Stat. 1,057). The plaintiff claims that the court below erred, and brings the case to this court for review. The facts of the case are substantially as follows: The plaintiff neglected and failed to pay the taxes on said lot from 1860 up to the commencement of this action. In May, 1862, the lot was sold to the county of Atchison for the taxes of 1861. The taxes for the years 1862 and 1863 were charged up against said lot. In May, 1864, the defendant paid into the county treasury the amount of taxes, interest and costs then due on said lot for the years 1861, 1862 and 1863, and obtained a tax sale certificate for the lot assigned to himself by the county treasurer of said county. In June, 1864, the defendant obtained a tax deed on this certificate, and had the same immediately recorded in the county register's office; and then took possession of the property and has had possession of the same ever since. He has also made lasting and valuable improvements on said lot, and has paid all the taxes accruing thereon ever since his supposed purchase of the tax title. Now under these circumstances what are the respective rights of the plaintiff and defendant? Now, while we think the tax deed is void upon its face and confers no title upon the defendant, yet we think the defendant is entitled to the benefit both of the claimant's occupying act and of the provisions of section 117 of the tax law. As the defendant's right to the benefit of the occupying claimant's act, we think the case of Stebbins v. Guthrie (4 Kas. 353) is sufficient authority. Although said tax deed is void upon its face, yet it takes a process of reasoning to make it apparent; and hundreds, and perhaps thousands of just such deeds have been executed in the various counties in this state; and until judicial decision of this court was promulgated, announcing that such deeds were void upon their face, the whole question was considered, both by bench and bar, as enveloped in considerable obscurity and uncertainty. An occupant of land under such a deed is entitled to the benefits of the occupying claimant's act. And for the same reason and others, we think the occupant of the land under such a deed is entitled to the benefits of section 117 of the tax law. Said section reads as follows: "If the holder of a tax deed, or any one claiming under him by virtue of such tax deed, be defeated in an action by or against him for the recovery of the land sold, the successful claimant shall be adjudged to pay the holder of the tax deed, or the party claiming under him, by virtue of such deed, before such claimant shall be let into possession, the full amount of taxes paid on such lands, with all interest and costs so allowed by law up to the date of said tax deed, including the costs of such deed and the recording of the same, with interest on such amount at the rate of twenty per cent. per annum, and the further amount of taxes paid after the date of such deed, and interest thereon at the rate of twenty-five per cent. per annum." This statute was enacted in the interest of equity and justice, and its pro-

visions should be so construed as to promote justice. It is wholly unlike that class of statutes which attempts to give the land of one person to another for an inconsiderable sum. The former is liberally construed, the latter is strictly construed. The former was enacted for just such cases as the one at the bar. It was enacted for void tax deeds and not for valid tax deeds. A person holding under a valid tax deed has no need of such a statute. Only persons holding under void tax deeds need such a statute. The laws under whose provisions tax titles are created are usually construed strictly, and therefore we hold that the tax deed in this case is void. But laws enacted for the purpose of enforcing in a fair and reasonable manner the delinquent members of society to discharge that moral obligation resting upon them, as well as upon others to bear their proportionate share of the public burdens, are always construed liberally so as to promote their object, and therefore we hold that before the plaintiff can recover his property he must pay to the defendant the taxes which he ought to have paid a long time ago to the public officers, and which the defendant has himself paid. As to the duty of a person to pay his taxes, see *Gulf Railroad Co. v. Morris* (7 Kansas 230 *et seq.*) As the equitable rule in granting relief to parties, who seek to avoid the payment of their taxes, see *Stebbins v. Challiss*, (15 Kansas), and cases there cited.

The judgment of the court below is affirmed.

All the Justices concurring.

### Trade-Marks—Deception upon the Public—Use of the Word "Patent."

THE CONSOLIDATED FRUIT JAR CO. v. DORFLINGER ET AL.\*

Circuit Court of the United States, Eastern District of Pennsylvania, in Equity, October 4, 1875.

Before Hon. JOHN CADWALLADER, District Judge.

1. **Trade-Mark—Deception of the Public.**—No title can be maintained in a trade-mark which is of a tendency to mislead or deceive the public.

2. **When this Objection may avail Defendant.**—This objection may avail defendant, notwithstanding what would otherwise be imputed to him as misconduct.

3. **Trade-mark Indicating that the Article is Patented.**—A trade-mark calculated to convey the impression that the article to which it is attached is patented, when there is no valid patent upon it, is deceptive in its name and therefore invalid.

4. **Patentee must Disclose his Secret.**—The patentee of an alleged invention is bound to disclose fully its secret, and is understood as dedicating the supposed invention to the public, subject to the supposed exclusive privilege. If the privilege is invalid the dedication is immediate and absolute.

5. **Use of the word "Patent" in a Trade-mark.**—Where the word "patent" or "patented" has by long usage become so associated with the name of an article, as to be understood as a part of that name, and not as representing it to be protected by letters patent, the use of that word in a trade-mark may not be calculated to mislead the public, and may not affect the validity of the trade-mark.

*Saml. A. Duncan & J. H. B. Latrobe, Esqs., for plaintiff;*  
*Charles S. Minor & John E. Shaw, Esqs., for defendant.*

Opinion by CADWALLADER, J.

The complainants deduce their asserted right under Mason, who was the patentee of certain alleged improvements in fruit jars. There has been a judicial decision against the validity of his patent; and they do not now assert its validity. But they claim a trade-mark in what I think is not sufficiently distinguishable from a claim of exclusive right in the patented privilege. In other words, the alleged trade-mark is either deceptively obscure, or purports to be for the subject of the patent, or to include it. These remarks apply, whether the trade-mark is claimed in the words "*Mason's patent, November 30th, 1858*," or in the words "*Mason's improved*," or in the words "*The Mason Jar of 1858*," or in any substantially similar form of words. If there had not been a patent, a different import might perhaps be attributable to the sec-

ond and third of the forms of words which have been quoted. But when the question is considered with reference to a pre-existence of a patent to Mason, these expressions are to be understood as applying to it, or as including the subject of it.

The patentee of an alleged invention, in consideration of the exclusive privilege granted to him for a limited period, is bound to disclose fully his secret; and is understood as dedicating the supposed invention to the public, subject to the supposed exclusive privilege. If the privilege is invalid, the dedication is immediate and absolute. It has, therefore, been contended that the rights of the public ought to be protected against any subsequent assertion by the patentee of an independent right under the name of a trade-mark.

This objection to the complainants' alleged right would prevail, if it covered the whole of the question. But it does not. The answer to the objection is, that tradesmen who have an individual patent may, nevertheless, rightfully use the subject of the patent himself, and that he ought, in that case, to be protected against injury by others who falsely impose their goods on the public as his own. Upon this view of the subject, the case of *Sykes v. Sykes* (3 B. & C. 541; 5 D. & R. 292), was decided in the year 1824. It is a decision apparently in favor of the complainants here. It was hastily considered on a motion for a new trial, a rule to show cause being refused. But there was no defect in the reasoning on the point upon which alone it was decided.

Another objection, however, to the complainants' bill, does not admit, in reason, of the same answer. This objection is, that no title can be successfully asserted in a trade-mark, which is of a tendency to mislead or deceive the public. This objection may avail a defendant, notwithstanding what would otherwise be imputable to him as misconduct. The doctrine is, that the complainant must come into a court of equity with clean hands: (4 De G., J. & S. 149). This doctrine, if applicable alike at law, was overlooked in the case of *Sykes v. Sykes*.

The direct application of the objection appears, when we consider the alleged trade-mark in question, tends rationally to induce a belief that the subject of it is a securely patented invention of Mason, whereas, it has been judicially decided that he never had a valid patent for it as an invention.

In cases prior to 1863, before English Vice-Chancellors, the authority of *Sykes v. Sykes* could not be disregarded, and there was great hesitation in holding directly that a trade-mark representing an article as patented, when in fact it was not securely protected by a patent, was invalid in equity. Thus, Vice-Chancellor Wood, afterwards Lord Hatherly, in 1853, intimated an opinion that the trade-mark would be invalid where no patent had ever existed, (*Flavel v. Harrison*, 10 Hare, 467); but afterwards, in the same year, when considering the case of a patent which had expired, suggested some qualification of the general doctrine. *Edelsten v. Vick*, 11 Hare, 86, 87; compare with *Morgan v. McAdam*, 36 L. J. Ch. 229, 231. But such doubts or hesitations were removed in England by the case of *The Leather Cloth Co. v. The American Leather Cloth Co.*, in the House of Lords in 1865, (11 H. L. 523), affirming a decree made by Lord Chancellor Westbury, in 1863. 4 De G., J. & S. 137. In this case, Lord Kingsdown said: "If a trade mark represents an article as *protected by a patent*, when in fact it is *not so protected*, it seems to me that such a statement *prima facie* amounts to a misrepresentation of an important fact, which would disentitle the owner of the trade-mark to relief in a court of equity against any one who pirated it;" and added, that he would have great difficulty in assenting to the distinction suggested by Vice-Chancellor Wood, in the case which has been cited. 11 H. L. 543, 544. Lord Kingsdown here succinctly restated the opinion of Lord Westbury, in the court of chancery; and Lord Westbury adhered to it in the court of appeal. (p. 548.)

An exception from this rule of decision had been previously,

\* Reported for this journal by Messrs. Hatch and Parkinson, attorneys for patent cases, Saint Louis and Cincinnati.

and has been since, recognized in the case of an article, such as *patent leather*, or *patent thread*, whose designation of this kind is in constant use, though no one supposes that it is thereby intended to convey the impression that the subject is protected by any patent. *Marshall v. Ross*, Law Rep. 8 Eq. 652, 653. So after a patented privilege is long since expired, such a designation may have become a general or special word of art. *Hall v. Burrows*, (4 De G., J. & S. 155). But such exceptions only confirm the rule of decision in ordinary cases.

Lord Westbury in the court of chancery, (4 De G., J. & S. 138, 139), seems have had American decisions in view. His opinion appears to have been followed in the Patent Office of the United States. If other American opinions are conflicting, it may, perhaps, be attributable to undue deference to the supposed authority of *Sykes v. Sykes*. If there be such a conflict, the question is too doubtful for interlocutory adjudication.

The above observations may not be applicable to the alleged trade-mark in the words "*The Mason Jar of 1872*." The complainant, if so advised, may renew his application as to this mark. But a man is perhaps not at liberty to flood the market with various designations, all including more or less of a common subject, without making the differences very distinct. How this may be as to the particular subject here, I can not at present decide.

As to the other alleged trade-marks, a preliminary injunction is refused.

### Right of Action for Injury Resulting in Death.

HANSFORD'S ADMINISTRATRIX v. PAYNE ET AL.

*Kentucky Court of Appeals, October 4, 1875.*

Hon. B. J. PETERS, Chief Justice.

" WILLIAM LINDSAY, }  
" WM. L. PRIOR, } Associate Justices.  
" MARTIN H. COFER, }

1. **Right of Action for Injury Resulting in Death.**—The court, construing its previous decisions on this question, and also chapter 10 of the General Statutes of Kentucky, held that, although where the death is instantaneous there could be no recovery, yet in cases not embraced within the exceptions of the statute, if there is an appreciable interval between the infliction of the injury and the death, the personal representative of the decedent may recover damages for the injury.

2. **Case in Judgment.**—Therefore, where the petition alleged that the defendants were druggists, and that their prescription clerk, in attempting to fill a physician's prescription, through "gross and culpable negligence," put up croton oil instead of linseed oil, which oil was, in consequence of such mistake, administered to the plaintiff's intestate, and "that it caused him great suffering and agony, and did him serious and irreparable injury, and was the immediate cause of his death on that day, and besides great injury and suffering, deprived him of the remainder of his natural life,"—it was held to state a good cause of action.

Appeal from the Mercer Circuit Court.

C. A. & P. W. Hardin and Geo. B. McKee, for appellant; Thompson & Thompson, Kyle & Pastor and Bell & Harding for appellees.

LINDSAY, J., stated the case and delivered the opinion of the court.

The petition shows that the appellees are druggists or apothecaries, and that their prescription clerk, in attempting to fill a physician's prescription, put up croton oil instead of linseed oil, and that this mistake was made through the "gross and culpable negligence" of the clerk. It further shows that the oil so put up was, in consequence of the mistake, administered as directed by the physician to appellants intestate, and "that it caused him great suffering and agony, and did him serious and irreparable injury \* \* \* and was the immediate cause of his death on that day, and besides great injury and suffering, deprived him of the remainder of his natural life."

Appellant sues as the personal representative of the deceased, and claims that she is entitled to recover "the sum of twenty-five thousand dollars, due her said intestate, for the wrongs, injuries and damages done him as aforesaid," and she prays for judgment for that sum.

Without raising a question as to the sufficiency of the petition,

appellees answered, and steps were taken by both parties in the preparation of the cause.

Afterward appellees moved to dismiss the action upon the face of the pleadings, and their motion was sustained.

This practice is certainly irregular, if not wholly unauthorized, and the judgment of dismissal can be sustained, if at all, only upon the ground that the petition presents no cause of action. It is not good as a petition under the third section of the act of 1864. Gross negligence is not necessarily the same as "willful negligence," and we have held frequently that to maintain an action under the provisions of the section and act named, it is necessary to charge "willful neglect," either in express terms or in language which clearly and necessarily imports that high grade of negligence. We must assume that the legislature purposely used the term "willful," and that it did not intend that it should be regarded and treated as synonymous with "gross," a word which, when applied to negligence, has a well-defined legal meaning. 2 Duvall, 576; 10 Bush.

But, notwithstanding this conclusion, it does not follow that the facts set out in the petition do not authorize a recovery. If the intestate had survived the "suffering and agony" resulting from the poisonous potion administered to him, he would undoubtedly, at the common law, have had a right of action against the employers of the negligent prescription clerk. *Fleet & Semple v. Hallenkemp*, 13 B. Monroe, 227.

If that right of action survives to his personal representative, then the petition is good.

The tenth chapter of the revised statutes, which is continued in force by the tenth chapter of the general statutes, provides that "no right of action for personal injury, or injury to real or personal estate, shall cease or die with the person injuring, or the person injured, except action for assault and battery, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but, for any injury other than those excepted, an action may be brought or revived by the personal representative, or against the personal representative, heir or devisee, in the same manner as causes of action founded on contract."

The wrongs and injuries complained of do not fall within either of the exceptions named in this statute, and according to its language literally construed, it is plain that the right of action growing out of these wrongs and injuries, survives to the personal representative of the injured person.

But appellees claim that the statute was not intended to, and does not, create new rights of action, and argue with plausibility and force that personal injuries resulting in death were not, at the common law, the subject of civil actions. In support of the last-named proposition, they rely upon the cases of *Eden v. The Railroad Company*, 14 B. Monroe, 204; *Murphy v. The Canal Company*, 9 Bush, 522; and *Case's Administrator v. The Railroad Company*, ib. 728.

These cases do sustain the doctrine that, in general, injuries affecting life can not be the subject of a civil action under the rules of the common law, but in *Eden's* case the court cite the case of *Baker v. Bolton*, 1 Campbell, 493, in which it was conceded that the husband might recover for the distress of feeling and the loss of society, from the moment of the injury to his wife up to the time of her death, and this court states the doctrine to be, that for aggravated injuries to the person of the wife or child, the husband or parent has an independent and separate cause of action for the loss of the society of the wife, or the service of the child, notwithstanding the fatal result of the injuries, and *Eden* was refused relief upon the sole ground that the death of his wife was instantaneous.

So, in the case of *Murphy*, the death of the child was instantaneous, and therefore the court correctly said that as the intestate had, during its life, no cause of action, none survived under the statute to its personal representative.

In the case of Case's Administrator, the court drew the distinction between the character of actions embraced by chapter 10, and the cause of action created by the 1st section of the act of 1854. This section gives a right of action for the death of intestate, whilst chapter 10 provides that actions for certain personal injuries shall survive, instead of dying with the person injuring or the person injured, as was the rule prior to its adoption. It is true it is said in that case that chapter 10 includes only causes of action growing out of personal injuries, not the direct and immediate cause of the death, but the context and the authorities cited and the case in hand, show that the court had in view only such injuries as resulted in instantaneous or immediate death.

The court did not intimate in either of the cases reported in 9th Bush that a cause of action which has accrued to the person injured will not survive to the personal representative in case the injury be the cause of the death. The recovery sought in each of those cases was for the death itself, and in each the death was instantaneous, and, therefore, in neither could such a question have been considered or adjudicated. We are of opinion that the cases relied on do not sustain the assumption, that causes of action growing out of personal injuries, ultimately resulting in death, are impliedly excepted from the operations of the chapter under consideration.

Whilst we hold that in order to authorize a recovery in such cases, there must be an appreciable interval between the infliction of the injury and the death, and that no recovery can be had where the death is practically instantaneous or immediate, we think the petition in this case shows that between the time the poison was administered and the moment at which the death occurred, there was an appreciable interval of time during which the intestate endured "great suffering and agony." For such suffering and agony the appellant is entitled to recover just as the intestate could have recovered if he had survived, and had obtained perfect and permanent relief at the moment of his death.

We do not anticipate that this ruling will (as appellees' counsel fears) enable parties to sue under the third section of the act of 1854, for the death, and also under the provisions of chapter 10, for the damages accruing anterior to the time of dissolution. A recovery of punitive damages for the destruction of life will certainly bar any other action for the injury, or any of its consequences, and if a party elects to sue, and enforce the right of action that survives to him, he will not be allowed afterwards to avail himself of the benefits of the punitive statute, and also to recover under its provisions.

Judgment reversed and cause remanded, with instructions to overrule appellee's motion to dismiss, and for further proceedings consistent with this opinion.

#### JUDGMENT REVERSED.

NOTE.—The above decision aptly illustrates the position in which several of the American courts have placed themselves by following the senseless rule laid down by Lord Ellenborough in *Baker v. Bolton*, 1 Camp. 493. If the death is *instantaneous* the decedent's administrator may not recover; if the decedent had lived an hour, as in this case, where he took an overdose of croton oil, the rule would be otherwise. It is really pitiable to see a grave and learned court forced by a religious regard for "precedent" to declare a doctrine so silly. Decisions of this kind when read by plain men of sense, create a feeling of contempt for the administration of justice, and for the whole legal profession. We have, as our readers are aware, steadfastly opposed the resorting to *fictions* in courts of justice. We have steadfastly insisted that a fiction is a lie, and should never be resorted to in the tribunals of a free country, where there is no tyrant to fear, and where the truth only should prevail. Strongly as this notion has taken hold of us, we are not sure but that we could excuse the Kentucky court, if it would resort to a fiction in order to help itself out of its predicament with reference to this question, where it evidently feels uneasy, if not a little ashamed. Let it declare as a rule of law that no death is instantaneous; and, like the French tribunals, when trying Frenchmen for killing German soldiers, leave it to the jury to decide whether a stroke of epilepsy or some other "visitation of God," between the time of the reception of the injury and the final cessation of life, may not, in fact, have been the principal cause of the death. At least the court might hold that it should be left to the jury in all cases to decide whether the death was in fact instan-

taneous; and it would be easy to prove the negative of this in all cases by medical testimony. Unless the legislature helps the Kentucky court, it will have to help itself in some such way as this. Not even the judicial tribunals, far as they are removed from the influence of popular feeling, can withstand forever the clamors of the people for common justice. We do not mean in these remarks to be disrespectful to the Kentucky court, they are not to blame for what their predecessors have done; and in this decision they have gone far towards relieving against the rule in the case in 14 B. Monroe, and for this they are entitled to the public thanks.

Upon this question, see *Sullivan v. Union Pacific Railroad Co.*, 1 CENT. L. J. 595; also 1 CENT. L. J. 590, 614, 622; 2 CENT. L. J. 12, 47, 117, 128, 165.

### Correspondence.

#### REMOVAL OF CAUSES.

NEBRASKA CITY, NEB., Oct. 19, 1875.

EDITORS CENTRAL LAW JOURNAL—DEAR SIRS:—In your issue of Oct. 15, inst., under "Legal News and Notes," you notice a recent decision of the Commission of Appeals of N. Y., refusing to transfer a cause before it to the Federal Court, because the petition failed to allege the citizenship of the parties at the commencement of the action, and your remark thereon: "The above decision is obviously correct, as otherwise it would be easy for one to defraud a state court of its jurisdiction by removing to another state, and there transferring the cause to a United States Court."

I have not as yet seen the case referred to, and so do not know the reasoning that induced the court to arrive at such a conclusion, but it is respectfully asked *where* would be the injustice or *fraud* in thus ousting a state court of its jurisdiction?

The petitioner for removal must file an affidavit "that he has reason to believe, and does believe, that from *prejudice* or *local influence* he will not be able to obtain justice in such state court." Rev. Stat., Sec. 639. Unless it is assumed that every applicant to remove a cause is ready to commit perjury, we are unable to see why he should not be at liberty to charge the former. Indeed, where the interests involved are large, and the judge who is to try the case, or the community in which it is pending, is so prejudiced or influenced that the rights of the applicant are jeopardized, why should a transfer be denied?

Moreover, the decision in *Pechner v. Ins. Co.*, savors of the oft-suppressed "jealousy" between concurrent jurisdictions, and is unbecoming a court as dignified and able as that of New York. The statutes of the United States authorizing a transfer of a cause for certain specified reasons, imposes no limitation upon the duration of the citizenship of the parties; if the applicant will make the necessary affidavit, and show that the cause is "between citizens of different states" (Laws of U. S. 1875, Chap. 137), and otherwise properly removable, we can perceive no reason why it should not be transferred, and we confidently predict that on appeal, if carried up, the Supreme Court of the United States will reverse *Pechner v. Ins. Co.*

Yours Respectfully,

E. F. WARREN.

### Book Notice.s

UNITED STATES DIGEST: A Digest of the Decisions of the Various Courts within the United States. By BENJAMIN VAUGHAN ABBOTT. *New Series*, Volume 5, being the Annual Digest for 1874. Boston: Little, Brown, & Company. 1875.

The profession will be rejoiced at the appearance of this volume, and will be glad to know that Mr. Abbott, who found the annual digests several years behind when he took charge of the work of compiling them, has nearly overtaken the flight of time.

As there is an occasional misapprehension among the profession in regard to the character of this work, we will state that the United States Digest consists of two series, the *First Series* and the *New Series*. The basis of the old series was two volumes published in 1847. These were continued down in annual volumes to include the year 1869. This series is now being consolidated by Mr. Abbott in a new work of about sixteen volumes, the first seven of which, extending into the letter J., have already been published. The new series consists of supplementary annual volumes, beginning with the year 1870.

Of the quality of the present work nothing further need be said than that the digests made by the author of this volume and his brother, Austin Abbott, are the models which are now generally imitated by the compilers of similar works; and that any digest which, in all its appointments, equals those of the Abbotts, is considered first class. Perhaps no man who has labored in this particular field of legal authorship, either in this country or in England, has performed as much work as the author of this volume, or performed it better; and while he certainly must feel that such a work at least is short-lived, and does not constitute a very *enduring* monu-

ment to its author; yet he must also have the satisfaction of knowing that no writer of his generation has placed his profession under equal obligations to him. It is not too much to say that the profession literally stand aghast at the magnitude of Mr. Abbott's works, and wonder what sort of a work shop it is in which he turns out, as by machinery, so many books, and such good ones, too; what sort of an engine it is, which is capable of propelling the machinery necessary for the doing of so much work; whether it is high-pressure, low-pressure or compound, and what the motive power; how many engineers, stokers and wipers he employs, and what kind of a lubricator he uses to keep the thing from wearing out. When Mr. Abbott gets tired of making digests, if he will just write out a receipt explaining how he does it, enclose it in a sealed envelope and put it up to the highest bidder, he will realize handsomely by the operation.

In the volume before us, one hundred volumes of reports are digested, namely: 17, 18 and 19 Wallace; 11 Blatchford; 3 Bissell; 5 Benedict; 5 and 6 Fisher; 8 and 9 Court of Claims; 1 to 10 Bankruptcy Register; 48 Alabama; 44 to 47 California; 40 Connecticut; 14 Florida; 48 and 49 Georgia; 59 to 63 Illinois; 40 to 45 Indiana; 35 and 36 Iowa; 10 to 12 Kansas; 25 Louisiana Annual; 61 Maine; 38 and 39 Maryland; 109 and 110 Massachusetts; 26 to 28 Michigan; 19 Minnesota; 49 Mississippi; 53 to 56 Missouri; 3 Nebraska; 9 Nevada; 53 New Hampshire; 36 New Jersey; 24 New Jersey Equity; 53 to 55 New York; 4 Abbott N. Y. Court of Appeals; 1 to 4 Thompson and Cook; 8 N. Y. Supreme Court, by Hun; 35 to 37 N. Y. Supreme Court; 4 Daly; 15 Abbott's Practice; 46 and 47 Howard's Practice; 70 and 71 North Carolina; 23 Ohio State; 72 to 74 Pennsylvania State; 5 to 7 Heiskell; 36 to 38 Texas; 46 Vermont; 23 Grat-tan, 5 West Virginia; 32 and 33 Wisconsin; and 1 and 2 Pinney;—work enough, we should suppose, to consume the time of one man for five years. Really, we should think Mr. Abbott would get tired after a while, and want to go a-fishing.

In his preface to the first volume of the New Series, Mr. Abbott tells us that his aim "is to present chiefly and prominently, the advance in general jurisprudence which has been made during the year. Cases which involve only the application of established rules to peculiar and unusual facts; opinions which are occupied with recapitulating well-known principles or accumulating cases from the authorities; adjudications of local importance only;—are to have a briefer treatment." But even with this plan of briefly dismissing unimportant decisions, it was when we took up this book difficult for us to understand how the contents of one hundred volumes of reports could be digested in a single volume of 863 pages, 74 of which are occupied by a table of cases; and we confess that a suspicion was aroused that a large number of cases must have been omitted; but on examining the table of cases, we find that about nine thousand cases have been included, which would make an average of 90 cases per volume of reports—about what American reports average, we believe. Mr. Abbott, however, states that in digesting the ten volumes of the Bankruptcy Register Reports, he has excluded some cases "which have been plainly suspended by subsequent statutes or decisions, and some which have appeared in former volumes of the annual digest, cited from other reports," and he has no doubt been wise in so doing.

The mechanical execution of this volume, like that of its predecessors, is excellent.

**A TREATISE ON PLEADING AND PRACTICE IN ACTIONS AND SPECIAL PROCEEDINGS IN THE COURTS OF IOWA, UNDER THE IOWA CODE OF 1873.** BY WILLIAM E. MILLER, Chief Justice of the Supreme Court of Iowa. Revised Edition. Des Moines: Mills & Co. 1875. pp. 832. Price, \$7.50. Sold by Soule, Thomas & Wentworth, Saint Louis.

We understand that the first edition of this work was received with general favor by the bar of Iowa. Judge Miller states in his preface, that the code of 1873, introduced a number of changes in the law relating to civil procedure, and thus rendered a revision of the work necessary, and that in making this revision he has been obliged to re-write much of it. He states that he has endeavored to embody the decisions of the supreme court, on questions of civil practice, down to, and including the 38th volume of reports, and including also some cases not yet reported. It would be obviously improper for us to attempt a critical examination of this work. First, because it would interest but a limited number of our readers; secondly, because it has already received the most thorough test to which a book can be subjected, that of use by a critical and exacting profession, and has not been found wanting; and thirdly, because of our inability properly to judge of the merits of a work on a subject with which we are not familiar. We may say, however, that if the appearance of a book is any index to its value, this book certainly ought to become a general favorite. It is the handsomest law book which has been laid upon our table since we began to edit this journal—with one exception, and that is the 38th volume of Iowa Reports, which we have just received from the same publishers. It will not surprise any one who is acquainted with the character of the people of Iowa and their manner of doing business, to be told

that these books are manufactured by Messrs. Mills & Co., at the capital of that state. For courage in war, or success in the arts of peace, the people of that state have no superiors in the Union. The central counties of Iowa present in the summer season the appearance of one continuous garden. Her state debt is merely nominal; her system of public schools, unsurpassed; church spires rise on all her prairies; and peace and industry reign throughout her borders. Surely it can not add much to the glory of a state, which, in its infancy, has produced so many distinguished soldiers, statesmen and jurists, and which abounds in so many happy homes, to say she can make a book as well as it can be made in Boston or in London; but trifling as this addition is to her laurels, we are glad of the opportunity of calling attention to it.

## Notes and Queries.

### CONTRACTS—IMMORAL CONSIDERATION.

OMAHA, NEB., Oct. 26th, 1875.

**EDITORS CENTRAL LAW JOURNAL:**—I see a query in the JOURNAL for Oct. 22d, 1875, as to whether money, property, etc., given in consideration of illicit intercourse, can be recovered back or not. It is a general rule of law that all contracts and agreements which are illegal, immoral and against public policy are void; and a court of justice will never lend its aid to assist either of the parties to such a transaction, but will leave them just where it finds them. When the agreement has been executed the court will not make any order rescinding it. See 11 John. 388; 4 Ohio, 419; 3 Cowen, 213; 4 John. 419.

A. N. F.

### ANOTHER ANSWER.

**EDITORS CENTRAL LAW JOURNAL:**—In your issue of October 22d, ante page 694, your correspondent "B." asks where a case may be found, "holding that where money, property, etc., is given in consideration of illicit intercourse, it can not be recovered back." Your correspondent will find, in the case of Marksbury, etc., v. Taylor, etc., 10 Bush. 519, decided by the Court of Appeals, January 7th, 1875, that the court, to use its own expression, was "brought face to face" with this identical question. Smith, in 1865, in consideration of adulterous intercourse, conveyed to Mrs. Taylor a house and lot of ground. Both Smith and Mrs. Taylor died shortly thereafter, and the widow and heirs of Smith instituted suit, and sought to have the deed cancelled, because the consideration was a vicious one. In this case it was held by the court that when parties are equally concerned in illegal agreements or transactions, whether *mala prohibita* or *mala in se*, courts of equity, like courts of law, will not interfere to grant relief to either. Story's Eq. 298; 11 Mass. 377; Cowper, 792; Bibb v. Bibb, 17 B. Mon. 307; Brookover v. Hurst 2 Met. 668. That an executed contract, based upon illicit sexual commerce, can not be set aside at the instance of the grantor, or his heirs at law, who can not occupy, in court, a better position than their ancestor, through whom they claim. "B." will find with the report of the case quite a large number of authorities which were cited by counsel, both in favor of, and opposed to the conclusion reached by the Court of Appeals.

L. M. Q.

October 29th, 1875.

### ADVERSE POSSESSION—ANSWER TO F.

KANSAS CITY, Oct. 27, 1875.

In answer to "F." CENT. LAW JOUR., vol. 2, p. 694. The original source of title to real estate is conquest—adverse holding. Adverse possession for the period specified in the statute is a civil conquest of the title. It operates to divest the title out of the former owner, and to rest it in the adverse possessor. Possession is transferred in deed, and by deed. It rests in parol proof. No deed or paper title is necessary. See Weber v. Anderson, 7 Chicago L. N. 196, and authorities there cited.

C.

## Some Recent Decisions in Bankruptcy.

### ORIGINAL JURISDICTION IN BANKRUPTCY OF UNITED STATES CIRCUIT COURT.

Allen, Assignee of J. A. Jessel, v. Binswanger and Jonas. United States Circuit Court, Eastern District of Missouri, Sept. 27, 1875. A bill in equity, brought by the assignee to recover from defendants between four and five thousand dollars, alleging that the defendants were attorneys for bankrupt, and at or before the filing of the petition in bankruptcy received from the bankrupt the amount aforesaid in furtherance of a scheme to effect a fraudulent composition with his creditors, under the bankrupt act; that after the filing of the petition in bankruptcy against Jessel, and when it became manifest that the composition would not be consummated, defendants paid over the money to the bankrupt, in fraud of the provisions of the bankrupt act, and the bankrupt absconded therewith. Demurrer on the ground that the district court, and not the circuit court, has jurisdiction of this cause of action. Held, by Miller and Treat, JJ. (citing McLean, Assignee, v. Lafayette Bank,

3 McLean, 185; Mitchell v. Mfg. Co., 2 Story, 660, and Pritchard v. Chandler, 2 Curtis, 483), that the circuit court had jurisdiction of such a cause of action. Demurrer overruled.

**NOTE.**—It has been generally understood that the United States Circuit Court for the District of Missouri, some years since, rendered a decision (unreported) contrary in effect to the foregoing. It is believed that the only reported case sustaining the demurrer is that of Buchanan v. Packard, 7 B. R. 353. Bump, on page 216 of his 8th edition, in reference to the question raised by the demurrer, cites several cases which have no relation to it whatever, viz: Morgan v. Thornhill, 5 B. R., (s. c. 11 Wall. 65), determining in what cases an appeal will lie from the Circuit Court to the Supreme Court. Smith v. Mason, 6 B. R. 1 (s. c. 14 Wall. 49), determining, when an assignee must bring a plenary, instead of a summary action; Woods v. Forsyth, 5 B. R. 78, determining when a firm is liable, instead of one of its members; *In re* Alexander, 3 B. R. 29, determining to what cases the appellate jurisdiction of the circuit court extends. E. T. A.

## Summary of Our Legal Exchanges.

LOWER CANADA JURIST, JULY AND AUGUST.\*

**Importer of Invention not an Inventor.**—Woodruff v. Moseley; Court of Queen's Bench. Opinion by Sanborn, J. [19 Low. Can. Jur. 169]. *Held*, that the mere importer of an invention, which has been patented for many years in the United States by some other party, is not the inventor or discoverer thereof, within the meaning of "The Patent Act of 1869," and a patent obtained by him under the said act, on the ground that he was the inventor or discoverer, is null and void.

**Goods held by Warehouse Receipt Insurable—Evidence—Identity.**—Wilson v. Cit. Ins. Co.; Court of Queen's Bench. Opinion by Dorion, Ch. J. [19 Low. Can. J. 175]. *Held*, 1. That goods held under a duly endorsed warehouse receipt, as collateral security for advances, may be properly and legally insured as being the property of the holder of such receipt, being the party who made the advance. That in an action for the recovery of the insurance of said goods, it is sufficient to establish that goods of the character and brand and of the quality claimed were actually in the building where the goods were stored, at the time of the insurance, and at the time the building and its contents were wholly burnt, without proving the actual identification of the goods described in the warehouse receipt.

**Collision of Vessels.**—The S. S. Quebec, Bennett; Vice-Admiralty Court. Opinion by Y. Okill Stuart, J. [19 Low. Can. J. 195]. A steamship, after colliding with a sailing vessel, continued her course and struck another sailing ship. *Held*, that the steamship that had disregarded the rules of navigation before the first collision, could not plead the fault of the vessel first struck, to a suit brought against her for the second collision.

**Negligence of Vessel Breaking Cable.**—The Czar; same court and judge. [19 Low. Can. J. 197]. *Held*, where a part of the line of an Electric Magnetic Telegraph passed under the river St. Lawrence, without injury to the navigation and so as not injuriously to interrupt the navigation of Canadian waters: *Held*, in a case of gross negligence on the part of a sailing ship, causing a wire cable to be broken, that her owners were liable for the damage.

**Collision between Steam and Sail Vessels.**—The S. S. Quebec v. The Charles Chalomer; and *vice versa*; same court and judge. [19 Low. Can. J. 201]. *Held*, where a steamboat did not keep out of the way of a sailing ship, there being risk of collision, and the sailing ship, by porting her helm, instead of keeping her course, contributed to the collision, both held to be in fault and neither entitled to recover the damage she sustained.

**Power of Legislature to Compel Attendance of Witness—Warrant.**—*Ex parte* Dausereau; Court of Queen's Bench. Opinion by Ramsay, J. [19 Low. Can. Jur. 210]. *Held*, 1. That the Legislative Assembly of the Province of Quebec has power to compel the attendance of witnesses before it, and may order a witness to be taken into custody by the sergeant-at-arms if he refuses to attend when summoned. 2. The omission to state in the speaker's warrant of arrest the grounds and reasons therefor is not a fatal decree. 3. The Quebec Statute, 33 Victoria, Cap 5, is within the powers of the local legislature.

NATIONAL BANKRUPTCY REGISTER, SEPT. 16 AND OCT. 1†

**Foreclosure pending Proceeding in Bankruptcy.**—Markson *et al.* v. Haney. Supreme Court of Indiana. Opinion by Worden, C. J. [12 Nat. Bank. Reg. 484]. If a mortgagee institutes proceedings to foreclose a mortgage after the commencement of the proceedings in bankruptcy, such proceedings may, on the application of the assignee, be stayed until the bankruptcy proceedings are closed.

**Conveyance by Insolvent for Present Consideration.**—Gattman & Co. v. Honea. In the United States District Court of Mississippi. Opinion by Hill, J. [12 Nat. Bank. Reg. 493]. 1. When an advance is made upon an agreement that certain and specific property shall be conveyed, and the

conveyance is made within a reasonable time thereafter, the advance will be considered as a present consideration for the conveyance. 2. An insolvent debtor may, for a present and sufficient consideration, sell or encumber his estate, provided the transaction is *bona fide*, and free from fraud, or an intention to defeat the operation of the bankrupt law. 3. To defeat a conveyance for a present consideration, the proof must show that the party to whom, or for whose benefit it was made, knew or had reasonable cause to believe the grantor insolvent, and knew that a fraud upon the law was intended. 4. The knowledge that a fraud was intended may be established by circumstantial evidence.

**Liquidating Security before Proving Debt.**—*In re* Anderson. United States District Court, Wisconsin. Opinion by Hopkins, J. [12 Nat. Bank. Reg. 502]. 1. The security that must be liquidated before the creditor can prove his debt, must be upon property real or personal of the bankrupt, that may be surrendered or conveyed to the assignee. 2. A claim which is secured by the endorsement, guaranty, or collateral liability of a third person may be proved as unsecured.

**Feme Covert as Surety—Dower—Mortgage—Partnership—Assets—Real Estate as Personality.**—Hiscock, Assignee, etc., v. Jaycox and Green; in United States District Court New York. Opinion by Wallace, J. [12 Nat. Bank. Reg. 507]. 1. A *feme covert*, by charging her inchoate right of dower for her husband's benefit, does not thereby become a surety for him. 2. An agreement that a *feme covert* is to be compensated for a release of her contingent right of dower is not to be implied. 3. Where real estate is covered by a mortgage, the inchoate dower attaches to the equity of redemption only. 4. If the holder of a note, the indorser of which is secured by a mortgage, proves the note as unsecured, this does not extinguish the mortgage, for the assignee is thereupon subrogated to the right of the holder. 5. The intent to consider real estate partnership assets may be implied from the fact that the losses in the transaction are to be sustained by the assets of the firm, and the profits which may accrue are to augment the capital of the firm. 6. When real estate is impressed with the character of personality, the *onus* is on the party who alleges that it has lost that character, to show, not only that the partnership creditors have been paid, but that, as between themselves, the accounts of the partners have been settled. 7. A *feme covert* is not entitled to dower in real estate which was held as partnership assets.

**Exemption Laws.**—*In re* John Owens; in United States District Court, Indiana. Opinion by Gresham, J. [12 Nat. Bank. Reg. 518]. 1. Congress may pass exemption laws impairing the obligation of contracts. 2. A bankrupt is entitled to an exemption of household and kitchen furniture, and other articles and necessities, although the same were taken under an execution levied before the commencement of the proceedings in bankruptcy. 3. Under the laws of Indiana, a bankrupt is not entitled to an exemption against a judgment for damages in an action of replevin or for costs.

**When Debt barred by Discharge.**—Lamb v. Brown; United States District Court, Indiana. Opinion by Gresham, J. [12 Nat. Bank. Reg. 522]. The debt of a creditor is barred by a discharge, although his name was not placed on the schedule, and he received no notice of the proceeding in bankruptcy, or of the petition for a discharge.

**Judgment by Default against Bankrupt, reviewed when.**—Shurtleff v. Thompson; Supreme Court of Maine. [12 Nat. Bank. Reg. 524]. If the bankrupt's counsel fails to appear for him in an action, because by mistake he supposed that the counsel for a co-defendant also appeared for the bankrupt, a review of a judgment by default entered against the bankrupt may be granted, so that he may plead a discharge.

**United States Penal Claim is Provable Debt.**—Barnes v. United States, Circuit Court, New York. Opinion by Hunt, J. [12 Nat. Bank. Reg. 526]. A claim of the United States against bankrupts to recover as a penalty the value of goods imported and entered contrary to law is a provable debt against the estate of the bankrupt.

**Power of District Court over Property in Involuntary Case.**—*In re* G. B. Holland, Jr.; United States District Court, Texas. Opinion by Duval, J. [12 Nat. Bank. Reg. 493]. 1. The District Court, in an involuntary case, has no authority under a provisional warrant to order the seizure of property from the possession of a person to whom the debtor transferred it before the filing of the petition. 2. The district court, in an involuntary case may issue an injunction to prevent the disposal of property by a person to whom the debtor has transferred it.

**Unsecured Debt.**—*In re* Dunkerson & Co. United States District Court Indiana. Opinion by McDonald, J. [12 Nat. Bank. Reg. 413]. 1. A creditor who holds a debt against a bankrupt, whose liability arises by his accommodation endorsement of bills of exchange, to secure the payment of which the drawers and acceptors have given certain collateral security, may prove his debt as secured. 2. A partnership is not entitled to retain, towards the payment of its debt, the surplus arising from the securities held by one part-

\*Montreal: Lovell Print and Pub. Co.

†New York: McDivitt, Campbell & Co.

ner for his debt. 3. Where a creditor has a general lien, and the debtor on receiving an advance or other accommodation from such creditor, deposits with him a particular security, specially intended, or appropriated, or even pledged to meet such advance, or to cover such accommodation, the security is subject not only to a particular lien for the advance or liability, but also to the creditor's general lien. 4. If two mercantile houses are composed wholly of the same persons, they constitute, notwithstanding the difference of their names of association, one and the same joint-party creditor, and if the creditors are entitled to a general lien and there is a deficiency in value of the securities deposited with either house, an ulterior general lien does not attach to any surplus in value of the securities deposited with the other house, except under special circumstances. 5. The difference in names implies an intended separation of possession and control, and in order to establish an ulterior general lien in favor of either house, it is only necessary to rebut this implication. 6. If the debtor knows that the two houses are composed of the same persons, and the declarations or acts of the parties, pending the business, indicate a belief on each side that either house may control the securities deposited with the other house, there is a general ulterior lien in favor of either, upon any surplus in the hands of the other. 7. A creditor who is vested with authority to sell securities, deposited with him, can not exercise it otherwise than under a trust for the debtor's benefit. 8. A creditor who holds stocks as collaterals, need not sell them by auction, but may sell them at the stock exchange or brokers' board. 9. If the debtor, though insolvent, acquiesces in a sale of stocks by a secured creditor, his assignee is bound by such acquiescence although the stocks are sacrificed. 10. The assignee is not bound by the bankrupt's ratification or acquiescence in a sale of collaterals made after the commencement of the proceedings in bankruptcy. 11. An assignment, though voidable at the suit of the assignee, is not void.

**Conveyance and Subsequent Creditors—When Assignee may Impeach Deed.**—Barker v. Smith *et al.* United States Circuit Court, Louisiana. Opinion by Wood, J. [12 Nat. Bank. Reg. 474.] 1. A voluntary conveyance by a person not in debt, can not generally be assailed as fraudulent by subsequent creditors. The omission to record a voluntary conveyance is a badge of fraud. 2. The assignee represents creditors, and may impeach a deed which is void as against them for want of due registration.

**Assignee and Preference Creditor—Pleading.**—Jordan, Assignee v. Downey. Court of Appeals, Maryland. Opinion by Bartol, C. J. [12 Nat. Bank. Reg. 427.] 1. A state court may entertain an action by an assignee to recover money received by a creditor as a preference. If money is brought into a state court under a *fi. fa.*, the assignee may intervene and claim the fund on the ground that the levy is void under the bankrupt law. 2. If a demurrer to an intervening petition is overruled, the demurrant is entitled to answer and be heard on the merits. 3. If a cause is heard on petition and answer, the statements in the answer will be deemed to be true.

**Pleading—Evidence—Action by Assignee.**—Dambmann v. White *et al.* California Supreme Court. Opinion by Crockett, J. [12 Nat. Bank. Reg. 438.] 1. A statement in a complaint that the plaintiff is assignee in bankruptcy, may be treated as surplusage, or at most *descriptio personae*. 3. Under a general averment that the plaintiff was possessed as of his own property, proof may be given that he acquired the title by means of proceedings in bankruptcy. 3. A complaint need not state how the plaintiff acquired title to the property in controversy. 4. In suits by an assignee, his representative character need not be averred in the pleadings. 5. If a duly certified copy of the assignment is put in evidence, it is not necessary to prove all the steps in the proceedings. 6. A state court may entertain an action by an assignee to recover property disposed of by the bankrupt in fraud of the bankrupt law.

#### ADVANCE SHEETS 54 NEW HAMPSHIRE REPORTS.\*

**Contract in Restraint of Trade—Statute of Frauds.**—Perkins v. Clay. [54 N. H. 518.] 1. A contract in restraint of trade, but limited as to time, place, or persons, is not void upon grounds of public policy, but may be enforced. 2. C. sold to H. his cart and business as a butcher for the sum of \$90, and agreed not to carry on the same business over the same route which he had formerly run so long as H. should want to carry on the business. Subsequently H. sold to P. the cart and business for the sum of \$90; and C., in consideration that H. released him from his former agreement, entered into a parol agreement with P. that he would not carry on the same business over the same route for a period of two years. *Held*, that there was a sufficient consideration for the promise from C. to P., and that the agreement was not within the statute of frauds.

**Voluntary Association—Trover.**—Danbury Cornet Band v. Bean. [54 N. H. 524.] The plaintiffs and the defendant associated themselves together under the name of the Danbury Cornet Band, but not as a corporation.

\*Courtesy of John M. Shirley, Esq., Andover, N. H., Reporter.

They adopted and subscribed certain by-laws, one of which was as follows: "If any member shall leave the band, he leaves all his interest with the band." Musical instruments for the use of the members were bought by the association, one of which was intrusted to the defendant for use. The defendant voluntarily withdrew from the association, taking with him said instrument, which he refused to surrender upon demand made for the same. *Held*, that trover for the same might be maintained by the remaining members of the association against him.

**Liability of Railroad as Common Carriers, as Warehousemen, and as Depositaries.**—Brown v. The Grand Trunk Railway. [54 N. H. 535.] 1. After the responsibility of a railroad as a common carrier has ceased, they may charge for storage of goods as warehousemen, in which case they will be liable for ordinary care in relation to the goods. 2. But where they are acting in good faith as mere depositaries, without pay, they are only responsible for slight care, and would not be liable for an act of ordinary negligence on the part of their servant in taking care of the goods.

**Attorney's Services to Infant.**—Barker v. Hibbard. [54 N. H. 539.] Services of an attorney, rendered to an infant in defending him in a bastardy proceeding, are necessities, for which, if it were reasonable for him to make a defence, he is liable on an implied promise.

**Nonsuit—Auditor's Report—Practice.**—Fulford v. Converse. [54 N. H. 543.] An auditor made his report at the November term, 1869, and the plaintiff elected a trial by jury. At the April term, 1871, the case not having been opened to the jury, the plaintiff moved to become nonsuit; the court denied the motion. *Held*, that there was no error in the ruling. Judge of Probate v. Abbot, 13 N. H. 21, distinguished.

**Contract—Disclosed and Undisclosed Principals—Agent.**—Chandler v. Coe and A. [54 N. H. 561.] 1. Where a principal carries on business in the name of his agent as a business name, the principal is liable upon a contract made by his agent for him in the agent's name, whether it is verbal or written; and if written, whether it is negotiable or not, and whether the agent disclosed his agency or not. 2. An undisclosed principal is liable to be sued and entitled to sue upon an express verbal contract, and also upon a simple written contract not under seal, but not upon a negotiable instrument made by his agent for him in the agent's name. 3. A disclosed principal is not liable to be sued nor entitled to sue upon a written contract made by his agent for him in the agent's name. 4. A principal is not liable to be sued nor entitled to sue upon an implied contract arising from the passage of the consideration between his agent and the other contracting party, where there was an express contract in the agent's name, whether verbal or written, unless an action might be sustained by or against him upon the express contract. 5. Where an agent is sued upon a written instrument executed in his own name, whether it is negotiable or not, and whether he disclosed his agency or not, parol evidence that he contracted only as agent is not admissible for the purpose of discharging him from liability.

**U. S. Coast Survey—Eminent Domain—Payment—Tender—Public Use—Statute—Constitutional Law.**—Orr v. Quimby. Opinion by Hibbard, J. [54 N. H. 590.] 1. It was not the intention of the legislature which enacted the general statutes, that the assessment of damages, and the tender provided for in ch. 132, should precede the entry upon and injury to lands therein authorized. 2. A state has constitutional authority to condemn private property for a public use by the United States. 3. Property taken for the use of the United States coast survey, is taken for a public use. 3. Chapter 132 of the general statutes is not unconstitutional, because it does not require an assessment of damages, and payment or tender of the sum assessed, before the entry upon and injury to lands therein authorized, nor provide for a definite and certain fund to secure the payment of compensation. Doe, J., dissenting. 5. A party injured, under the authority of ch. 132 of the general statutes, is not entitled to commence an action of tort and maintain it, until an assessment of his damages shall have been made under the statute, and the sum assessed paid or tendered. 6. An agent of the United States, entering upon and doing injury to land, in the service of the coast survey, under the authority of ch. 132 of the general statutes, will be liable to an action of tort, unless such entry and injury were reasonably necessary for the purpose of the coast survey.

THE COMMERCIAL LEGAL REPORTER. OCT. 13.\*

**Trespass—Rights of Lessee.**—McNaery v. Hicks; Supreme Court of Tennessee. Opinion by Sneed, J. Where there was an avowed trespasser upon the lessee's right of possession, who pretended no claim to or interest in the property, and who so notified the lessee, and the latter never objected to paying the rent on account of such trespasser's occupancy of the premises, until more than a year from the beginning of the lease; *held*, that it was the right and duty of the lessee, who was in contemplation of law in possession

\*Nashville: J. D. Park.

from the moment of the delivery of the lease, to eject the trespasser, and not the duty of the lessor. And there must be something which in law amounts to an eviction or an expulsion of the tenant to work a suspension of the rent.

**Compromise by Administrator.**—Alexander *et al.* v. Kelso *et al.* Same court. Opinion by Nicholson, C. J. Where an administrator was satisfied it was prudent in him to make a compromise, pending a suit, as he had no means of the estate to carry on an expensive suit, and he believed there was real doubt as to his ability to make the party liable; *held*, that he has a right to compromise such a case, and in that way promote the interest of his estate.

### Recent Reports.

REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF MICHIGAN. Vol. 29. By HOYT POST, State Reporter. Lansing: W. S. George & Co. 1875.

This is a volume of 528 pages, with 116 additional pages of index, and a table of cases. The index consists of a reprint of the matter contained in the syllabi, with copious cross-references. The table of cases, covering 11 pages, is in itself a sort of index, the name and style of each case being followed by the italic head-lines of the syllabi, thus indicating the subject-matter of each decision. The book has a good, honest appearance, the pages being wide and full, and lightly leaded. It contains reports of 91 cases, and covers two full terms and part of a third. We note the following decisions:

**Construction of Grant—Omission of Grantee's Name.**—Newton v. McKay, p. 1. Opinion by Graves, C. J. To constitute a valid conveyance the grant must undoubtedly distinguish the grantee from the rest of the world; but if, upon a view of the whole instrument he is pointed out, even though the name of baptism is not given at all, the grant will not fail.

**Mortgage-notes—Notes Payable in Bank—Payment—Assignment of Mortgage.**—Pease v. Warren, p. 9. Opinion by Cooley, J. Where notes secured by mortgage, were made payable in bank, the payor deposited, in his own name, in the same bank, funds to meet such notes, with instructions to the bank to take them up. The mortgage was assigned without endorsement of the notes. The bank refused payment to the assignee because the notes were not endorsed. *Held*, that such deposit was not a payment of the notes; that the bank was not the agent of the payee; and that the mortgagee's assignee was not precluded from foreclosure.

**Conditional Sale of Piano—Bailment.**—Whitney v. McConnell, p. 12. Opinion by Campbell, J. A contract for sale of a piano upon installments, providing that the piano should remain the property of the vendor, but in possession of vendee, creates a bailment in the vendee; and a condition against removal was valid.

**Written Contract—Subsequent Parol Contract.**—Seaman v. O'Hara, p. 66. Opinion by Cooley, J. A parol arrangement, of a character not required to be in writing, is not objectionable on the ground that it varies a prior written contract on the same subject; the written contract, and the subsequent oral contract may both be valid so far as they are not inconsistent; and to the extent that they are inconsistent, the one latest in time will control.

**Construction of Will—Devise of Proceeds of Lands when Sold—Vested Remainder in Fee—Restrictions upon the Right of Alienation.**—Mandlebaum v. McDonell, p. 78. Opinion by Christianity, J. A will which provided for sales of realty and distribution of proceeds among the devisees, subject to the widow's life estate, without stating who should make the sales, but clearly expressing the intent to deprive the devisees from making them, *held* to confer a naked power of sale on the executors, but vested no title in them. Such devise *held* to be in legal effect a devise of the remainder in fee. The devisees may, collectively or individually, elect to take the land in lieu of proceeds, although the will should expressly forbid such election. A restriction in the will, upon the right of the devisees to sell their interest during a period named, is invalid. The maxims, "*Modus et conventio vincunt legem*;" "*Conventio privatorum non potest publice juri derogare*;" and "*Fortior et potentior est dispositio legis quam hominis*;" considered and applied. The authorities upon the subject of restrictions upon the right of alienation, reviewed.

**Constitutional Law—Construction of Statute—Mandamus.**—The People *ex rel.* etc., v. The Common Council of Detroit, p. 108. Opinion by Cooley, J. A statute will not be held unconstitutional because it attempts too much and confers some powers that are inadmissible, provided in the main the powers conferred be lawful; except when such statute creates a system, and the part which is legal can not stand by itself. Mandamus granted to compel the respondents to act upon nominations made by the mayor under an act to establish a board of public works, the act being held not open to the objection that it takes away from the council its general legislative authority.

**Foreign Corporation—Removal of Causes to U. S. Circuit Court.**—Home Ins. Co. v. Davis, p. 238. Opinion by Campbell, J. Where a corporation in order to secure the benefits of transacting business in a state other than the one of its creation, undertakes to submit itself to the jurisdiction of the courts of such state, such condition is lawful, and precludes the right of transferring causes from such state courts to the courts of the United States.

[NOTE.—This position has been overruled by the Supreme Court of the United States. See Home Ins. Co. v. Morse, 20 Wall. 445.]

**Constitutional Law—Enlargement of City Boundaries by Legislature—Alteration of Boundaries of Representative Districts.**—The People, *ex rel.*, etc., v. Holihan, p. 116. Opinion by Graves, C. J. The legislature has no authority to enlarge the boundaries of a city by annexing to it parts of adjoining townships so as to interfere with the boundaries of representative districts, at a time when any alteration of such boundaries is forbidden by the constitution.

**Execution Sales—Partition—Redemption.**—Whiting v. Butler, p. 122. This case, in the language of Mr. Justice Cooley, "presents important questions regarding the rights of purchasers at execution sales." It is too long to give a full abstract. The following points were decided in the opinion of Cooley, J., concurred in by Christianity, J.; Campbell, J., and Graves, C. J., holding contrary opinions. On Dec. 28, 1855, one Drury bought at execution sale, Theodore J. Campau's undivided interest as one of nine tenants in common in certain lands; in January 15, 1866, Godfrey, Dean & Co. caused an execution to be levied upon the same interest, and on the sale became purchasers, and on June 29, 1867, a sheriff's deed in due form issued to their assignees who conveyed to one Butler; no steps were taken within the statutory period to redeem from the Drury sale, but on March 27, 1867, there was deposited with the register of deeds, but by whom is a disputed question, the amount of Drury's bid and interest, which on the next day was paid by the register to Drury, who endorsed upon his certificate of sale a receipt for the amount in full of his certificate; in June, 1872, Drury quit-claimed to Theodore J. Campau, and in Oct., 1872, the sheriff executed a deed to him as Drury's assignee; Campau and his co-tenants, treating the Godfrey, Dean & Co. execution sale as ineffectual, proceeded to have partition made in chancery of their interests, whereby the parcel in controversy in this suit was set off to Daniel J. Campau, who occupied by his tenant Whiting; Butler brings ejectment to recover the undivided ninth part of the premises under the title derived from the latter sheriff's sale. *Held*, by Cooley and Christianity, JJ., that these proceedings under the Drury execution operated to defeat the force and effect of the sale and deed under the later execution, so as to be a legitimate defence to this action of ejectment; that a partition among tenants in common to which an execution purchaser of the undivided interest of one of them was not made a party will not affect the rights of such purchaser; that the interest of an execution debtor in lands levied on and sold, is something more than a mere right of redemption, he still has the legal title, not divested by a mere failure to redeem so long as the sale has not been carried into effect by sheriff's deed; that the mere right to redeem can not be the subject of an execution sale; that it was immaterial whether the transaction between Drury and the register of deeds amounted to redemption or not, if it did, the plaintiff could have the legal title without conditions, if not, he would still have it subject to defeat when the Drury sale was carried into effect by deed, either of which would entitle him to recover in ejectment; that the equitable right of an execution purchaser to demand and receive a sheriff's deed, after the period of redemption has expired, is one which may be lost by waiver at any time before the conveyance is actually made.

**Resulting Trust—Entry of Lands by One in the Name of Another.**—Weare v. Linnell, p. 224. Opinion by Cooley, J. Weare located lands under military warrants, in the name of the defendant, then a minor, and without his knowledge or consent, averring that it was done to make compensation to defendant for future services while a minor, as one of Weare's family. Defendant did not remain long in Weare's family, and only knew of the location of the land in his name when he was about leaving, when he promised to make a conveyance to Weare, and release any claim he might have in the land. After becoming of age he refused to so convey, but conveyed to Moffat, his co-defendant. *Held*, that no resulting trust could be declared in Moffat for the benefit of Weare; nor could Weare claim a vendor's lien, and the bill was ordered to be dismissed.

**Ministerial Duties—Governor—Mandamus.**—The People *ex rel.*, etc., v. The Governor, p. 320. Opinion by Cooley, J. This was an application for an order requiring the governor to show cause why he does not issue his certificate showing that the Portage Lake and Lake Superior Ship Canal and Harbor have been constructed in conformity with the acts of Congress making a land grant for the same, and the acts of legislature conferring the grant upon a corporation. The court held that when such a duty is devolved on the governor, as in this case, it will be presumed to have been done

because of his superior judgment, discretion, etc., and such duty can seldom be considered as merely ministerial, and declined to entertain the application. The opinion reviews at some length the several relations and duties of the officers of government, legislative, judicial and executive.

**Riparian Rights—Use of Running Water.**—*Dumont v. Kellogg*, p. 420. Opinion by Cooley, J. As between several neighboring proprietors of water-power, the priority of appropriation and use of the same gives to one proprietor no superior right to that of the others, unless it has been continued for a period of time, and under such circumstances as would be requisite to establish rights by prescription. Neither has the right to so use the waters as to interfere with the use of the same by the others. A fair participation and reasonable use by each is what the law seeks to protect. The general usage of the country in similar cases is competent evidence of what is a reasonable and proper use of a common right.

**Contract—Construction of Railroad—Changes in Surface after Survey.**—*Grand Rapids, etc., R. R. Co. v. Van Dusen*, p. 431. Opinion by Christianity, J. A great fire having swept over the line of the survey of a railroad after the survey and before the contract was made, and burned away the soil so that it required more earth for fills and embankments than the survey called for, the jury were permitted, in a suit for determining the amount of work done, to take such fact into consideration. C. A. C.

### Legal News and Notes.

—FIFTEEN FULL BLOWN KISSES, and several others in the bud, were recently showered upon a New Jersey lawyer in open court, by a fair young client whom he had saved from the disgrace of imprisonment.

—READERS of the article, "Estoppel and Registration," *ante*, p. 665, are referred to Wag. Stat. p. 1351, sec. 3, for the Missouri law upon the subject discussed by the learned judges in 9 R. I. 258. We are indebted for the suggestion to J. K. Cravens, Esq., of Kansas City.

—JUDGE LAWRENCE, of the Supreme Court of New York, holds that the voluntary enlistment of an alien in the militia of this state is as abiding as the act of a citizen. This is right. The obligation is one which no foreigner need assume, but, once assumed, it should be enforced.—[*N. Y. Herald*]

THE election which took place on Saturday last in Missouri, resulted in the adoption of the new constitution by a majority of probably four to one. It was opposed by what is known as the "bummer element" in politics, and also by a small sprinkling of honest men. It gives Saint Louis a new appellate court composed of three judges; provides for the separation of Saint Louis city from Saint Louis county, and for the erection of separate municipal governments; it puts a muzzle on corrupt legislation, and works many other changes to numerous to be recapitulated. As it goes into effect on the 30th of November, it is important that public officers should study its provisions. Various editions have been published, among them are printed four stereotype plates of the Saint Louis Republican, and circulated to our local subscribers as a supplement to this journal. The best, however, is an edition by Mr. Myer, a diligent and painstaking member of the Saint Louis bar, and published by Mr. Gilbert of this city. It is in pamphlet form; indicates in every instance the changes which the new instrument has introduced, and contains many references to judicial decisions. It may be had of the publishers of this journal.

—THE *Levant Herald* says, a circular which the Grand Vizier has just addressed to the provincial governors, may dispel some misconceptions which seem to have arisen in the minds of foreigners regarding the provisions of the Ottoman law of inheritance. According to the document in question, it would appear that Rayah women have lately, in several instances, attempted to leave their property to children or relatives of theirs who have assumed or inherited foreign protection. But foreigners have no right, the circular says, to inherit property from Rayah women, and the Grand Vizier justifies this prohibition by the following reasons: "In the first place," his highness writes, "the right of possession and the right of inheritance are two very distinct things; secondly, the treaties in force do not arrogate for foreign subjects the privilege of inheriting property from Rayahs; and thirdly, property is thus mostly kept in the possession of Ottoman subjects, a state of things which is favorable to the state." The circular concludes by stating, that foreigners in Turkey can inherit property only from persons who are likewise foreign subjects, and who have more-over obtained regular possession of such property in accordance with the rules laid down in the last treaties.

—UNCONSTITUTIONAL.—The legislature of Missouri, on March 27, 1873, passed the following act: "An act to provide for the more special determination of criminal cases in the supreme court. Section 1. Any person being convicted upon an indictment for felony, and no supersedeas is granted, may, if he so elect, take an appeal or sue out a writ of error, returnable to the term

of the supreme court next following such conviction, and more than twenty days thereafter, wherever such term shall be held, any law to the contrary notwithstanding," etc. On the 20th of April, 1875 in the St. Louis Criminal Court, John Steptoe was convicted of robbery, first degree, and sentenced to the penitentiary for ten years. An appeal was taken to the supreme court, and Messrs. James W. Hutchings and P. W. Fauntleroy, his attorneys, removed the case to Jefferson City, under and by virtue of the above act. Attorney-General Hockaday and Mr. Fauntleroy agreed to submit the case on brief, and on Friday last Mr. Fauntleroy appeared before the supreme court at Jefferson City, and made a motion to advance the case on the docket, so that it could be decided at once upon brief. But the supreme court refused to entertain the case at all, upon the ground that the court had no jurisdiction, the above act, under which the case was removed to Jefferson City being unconstitutional and void, as being in conflict with art. 6, sec. 5, Const. Mo., which provides that the state shall be divided into convenient districts, and that the supreme court, when sitting in either district, shall have jurisdiction over cases originating in that district only. So Messrs. Fauntleroy and Hutchings will withdraw the papers and file them in the supreme court at St. Louis, and in the meanwhile Steptoe will remain in the penitentiary.—[*St. Louis Republican*].

—THE Melbourne Argus says: An important question as to the law of copyright in newspaper telegrams has lately been debated in the supreme court. The proprietors of the Argus pay a large sum for the purpose of obtaining the latest telegrams from Europe. Any newspaper proprietors who may wish to publish the telegrams so obtained can do so by paying a contribution towards the expenses incurred. The proprietor (Mr. Luke) of the Gipps Land Mercury made an agreement to pay for the right of re-publishing the telegrams. This agreement was carried out for several months, when Mr. Luke cancelled it. The European telegrams received by the Argus, were, however, republished in another form, as from a Melbourne correspondent of the Mercury, with the preliminary words, "It is reported," or "The news about town is." This was considered a breach of the copyright which the proprietors of the Argus possessed in the telegrams, and as there was another newspaper at Sale that did contribute towards the expenses of the receipt of the telegrams, a suit was instituted in the equity court to restrain Mr. Luke from re-publishing the telegrams. It was argued for the defendant that, as the telegrams were matters of news, any one could re-publish them without breach of the copyright act. Mr. Justice Molesworth held, however, that the plaintiffs had a property in the telegrams, and that no one could republish them without the permission of the persons to whom they had been sent in the first instance. An injunction was, therefore, granted to restrain the defendant from publishing the telegrams.

—THE "RING" SUITS at New York have raised afresh the question how far a lawyer is justified in defending a client whom he knows to be guilty, and in receiving his fee from money he knows to have been illegally acquired. On this subject the following extract from the address of the Hon. Charles S. May, delivered to the last class at the Law School of Michigan University, may be of interest. He says: "I protest against such a doctrine as a wrong to society and a slander upon the law. I insist that the first duty of the lawyer is to society and the law, and that his duty to his client is always subordinate to this higher duty. All this is involved in his lawyer's oath. He is first of all sworn to uphold the constitution of the state. Upon this rests the whole civil fabric of society. Next he is to be true to the court. The court represents and stands for the sanctity and majesty of the law itself. It is the interpreter and vindicator of the law. Last, he is to be true to his client. But he can not be true to his client in any just sense while he is false to society and the law. That is not the kind of truth he is to keep with his client. His oath pre-supposes no conflict between his client's interest and the interests of the state. He is not sworn, therefore, to help a guilty man, whom he knows to be guilty, to escape at the expense of law and justice. The indiscriminate and over-zealous defence of criminals without thought or care as to their guilt; the unreasonable theories; the unscrupulous tactics; the brow-beating of witnesses; the reckless assertions and the bold affectations of truth and innocence,—these are things which have brought criminal advocacy into disrepute with the people; which has kept so many able self-respecting lawyers from this department of practice and made the very term criminal lawyer signify want of character and honor; have almost made, indeed, the adjective stand for a designation of the kind of lawyer rather than the kind of practice. No; the highest public duty is always to the state, and nothing must conflict with that. The lawyer should never forget that he is a citizen. He should never lend himself or hire himself to any service which will harm or hurt society. His noble profession does not require him to do this. It does not demand that he be the unscrupulous aider and helper of ruffians and lawbreakers, nor a mere unthinking human machine of advocacy. It has other and higher commands for him; other and nobler work for him to do."